S. HRG. 99-141, PT. 4

CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

CONFIRMATION HEARINGS ON APPOINTMENTS TO THE FEDERAL JUDICIARY AND THE DEPARTMENT OF JUSTICE

MAY 7, 14, 21, JUNE 4, 11, 18, 25, AUGUST 13, SEPTEMBER 10, AND OCTOBER 1, 1986

PART 4

Serial No. J-99-7

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
65-312 O WASHINGTON : 1987

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

5521-38

COMMITTEE ON THE JUDICIARY

STROM THURMOND, South Carolina, *Chairman*

CHARLES McC. MATHIAS, Jr., Maryland
PAUL LAXALT, Nevada
ORRIN G. HATCH, Utah
ALAN K. SIMPSON, Wyoming
JOHN P. EAST, North Carolina
CHARLES E. GRASSLEY, Iowa
JEREMIAH DENTON, Alabama
ARLEN SPECTER, Pennsylvania
MITCH McCONNELL, Kentucky

JOSEPH R. BIDEN, Jr., Delaware
EDWARD M. KENNEDY, Massachusetts
ROBERT C. BYRD, West Virginia
HOWARD M. METZENBAUM, Ohio
DENNIS DeCONCINI, Arizona
PATRICK J. LEAHY, Vermont
HOWELL HEFLIN, Alabama
PAUL SIMON, Illinois

Dennis W. Shedd, *Chief Counsel and Staff Director*
Diana L. Waterman, *General Counsel*
Melinda Koutsoumpas, *Chief Clerk*
Mark H. Gitenstein, *Minority Chief Counsel*

CONTENTS

WEDNESDAY, MAY 7, 1986

STATEMENTS

Page
Thurmond, Chairman Strom ... 1
Hawkins, Senator Paula ... 1
Chiles, Senator Lawton ... 5

TESTIMONY OF NOMINEE

Fawsett, Patricia C., U.S. district judge, middle district of Florida ... 6

SUBMISSIONS

Letter and resolution from the Orange County Bar Association, Orlando, FL ... 3
Biography ... 9

WEDNESDAY, MAY 14, 1986

STATEMENTS

McConnell, Senator Mitch ... 11
Gramm, Senator Phil ... 11
Kennedy, Senator Edward M. ... 12
Bradley, Senator Bill ... 13
Lautenberg, Senator Frank ... 14
Conte, Representative Silvio, Congressman from Massachusetts ... 19
Simon, Senator Paul ... 23

TESTIMONY OF NOMINEES

Norris, Alan E., U.S. circuit judge, sixth circuit ... 21
Hittner, David, U.S. district judge, southern district of Texas ... 24
Lechner, Alfred J., Jr., U.S. district judge, district of New Jersey ... 26
Woodlock, Douglas P., U.S. district judge, district of Massachusetts ... 29

SUBMISSIONS

Letter from the Association of the Federal Bar of the State of New Jersey ... 16
"Lawyer Group Backs Lechner for Judgeship," by Robert Cohen, Newark Star-Ledger, May 1 ... 18
Biographies ... 33

WEDNESDAY, MAY 21, 1986

STATEMENTS

Thurmond, Chairman Strom ... 35
Wilson, Senator Pete ... 38
Cranston, Senator Alan ... 39

TESTIMONY OF NOMINEES

Williams, Stephen F., U.S. circuit judge, District of Columbia circuit ... 35
Davies, John G., U.S. district judge, central district of California ... 40

SUBMISSIONS

Page
Biographies ... 44

WEDNESDAY, JUNE 4, 1986

STATEMENTS

Specter, Senator Arlen ... 47
Heinz, Senator John ... 48
McDade, Representative Joseph, Congressman from Pennsylvania ... 49

TESTIMONY OF NOMINEE AND WITNESS

Kosik, Edwin M., U.S. district judge, middle district of Pennsylvania ... 51
McNulty, James Barrett, former mayor, Scranton, PA ... 54

SUBMISSION

Biography ... 56

WEDNESDAY, JUNE 11, 1986

STATEMENTS

McConnell, Senator Mitch ... 57
Domenici, Senator Pete V ... 57, 60
Bingaman, Senator Jeff ... 58
Lujan, Representative Manual, Jr., Congressman from New Mexico ... 59
Skeen, Representative Joe, Congressman from New Mexico ... 60
Thurmond, Chairman Strom ... 61
Hollings, Senator Ernest F ... 63
Dixon, Senator Alan J ... 70
Wilson, Senator Pete ... 78

TESTIMONY OF WITNESS AND NOMINEES

Bowen, Hon. Dudley H., Jr., U.S. district judge for the southern district of Georgia ... 70
Wilkins, William W., Jr., U.S. circuit judge, fourth circuit ... 72
Henderson, Karen L., U.S. district judge, district of South Carolina ... 76
Jensen, D. Lowell, U.S. district judge, southern district of California ... 79
Stiehl, William D., district judge, southern district of Illinois ... 90
Conway, John E., U.S. district judge, district of New Mexico ... 92

SUBMISSIONS

Prepared statements of Hon. Carroll A. Campbell, Jr ... 66
Letter from E.P. Riley to Senator Biden, in favor of nominee ... 68
Biographies ... 93

WEDNESDAY, JUNE 18, 1986

STATEMENTS

McConnell, Senator Mitch ... 97
Ford, Senator Wendell ... 98

TESTIMONY OF NOMINEE

Simpson, Charles R., III, U.S. district judge, western district of Kentucky ... 105

SUBMISSIONS

Résumé ... 100
Letter from Laurence E. Higgins, chief circuit judge for the Jefferson Circuit Court of the Commonwealth of Kentucky ... 102
"Federal Judge Nominee Is Given High Marks by Friends, Colleagues," by Alan Judd, Courier-Journal, June 16, 1986 ... 103
Biography ... 107

WEDNESDAY, JUNE 25, 1986

STATEMENTS

Page

Thurmond, Chairman Strom 109

D'Amato, Senator Alfonse 109

Moynihan, Senator Daniel Patrick 110

NOMINEE

Burns, Arnold I., Deputy Attorney General of the United States 111

SUBMISSION

Biography 114

WEDNESDAY, AUGUST 13, 1986

STATEMENTS

Thurmond, Chairman Strom 115

Metzenbaum, Senator Howard M 115

Glenn, Senator John 116

Latta, Representative Delbert, Congressman from Ohio 117

Wilson, Senator Pete 118

Denton, Senator Jeremiah 120

Heflin, Senator Howell 123

Matsunaga, Senator Spark 123

Inouye, Senator Daniel 125

Kerry, Senator John 136

Kennedy, Senator Edward M 137

TESTIMONY OF NOMINEES AND WITNESS

Dubina, Joel F., U.S. district judge, middle district of Alabama 139

Kay, Alan C., U.S. district court judge, district of Hawaii 142

McQuade, Richard B., Jr., U.S. district court judge, northern district of Ohio ... 144

Trott, Stephen S., Associate Attorney General of the United States 146, 148

Weld, William F., Assistant Attorney General, Criminal Division, Department of Justice 148, 163

Hamerman, Warren J., chairman, National Democratic Policy Committee 171

SUBMISSIONS

Letters of recommendation for Alan C. Kay 126

Response to questions from Senator Grassley to Stephen Trott regarding civil RICO 153

Testimony in opposition to the nomination of William Weld, submitted by Warren J. Hamerman 175

Biographies 190

WEDNESDAY, SEPTEMBER 10, 1986

STATEMENTS

Thurmond, Chairman Strom 193

Hatfield, Senator Mark 193

Packwood, Senator Robert 195

Mathias, Senator Charles McC., Jr 196

Sarbanes, Senator Paul S 197

Glenn, Senator John 198

Quillen, Representative James H., Congressman from Tennessee 199

TESTIMONY OF NOMINEES

O'Scannlain, Diarmuid F., U.S. circuit judge, ninth circuit 202

Graham, James L., U.S. district judge, southern district of Ohio 204

Porter, James Kenneth, U.S. district judge, eastern district of Tennessee 206

Smalkin, Frederic N., U.S. district judge, district of Maryland 209

SUBMISSIONS

Page
Prepared statement of Jacob A. Stein, in support of Frederic Smalkin 198
Biographies 211

WEDNESDAY, OCTOBER 1, 1986

STATEMENTS

Thurmond, Chairman Strom 213
Chaffee, Senator John H 214
Pell, Senator Claiborne 214
Kerry, Senator John 216
Hollings, Senator Ernest F 217, 219
Tallon, Representative Robin M., Congressman from South Carolina 218
Denton, Senator Jeremiah 223
Heflin, Senator Howell 227
Warner, Senator John 228, 230
Wilder, Lt. Gov. Douglas C., Commonwealth of Virginia 229
Riegle, Senator Donald W., Jr 233
Levin, Senator Carl 235
Pursell, Representative Carl D., Congressman from Michigan 235

TESTIMONY OF NOMINEES AND WITNESSES

Ginsburg, Douglas H., U.S. circuit judge, District of Columbia circuit 236
Selya, Bruce M., U.S. circuit judge, first circuit 237
Duggan, Patrick J., U.S. district judge, eastern district of Michigan 238
Howard, Alex T, Jr., U.S. district judge, southern district of Alabama 239
Spencer, James R., U.S. district judge, eastern district of Virginia 242
Anderson, Joseph F., Jr., U.S. district judge, district of South Carolina 244
Napier, John L., judge, U.S. Claims Court 248
Wiese, John Paul, judge, U.S. Claims Court 253
Friedman, Paul L., president, the District of Columbia Bar 256
Huebner, Lawrence H., president, D.C. Superior Court Trial Lawyers Association 266
Speights, Nathaniel H., president, the Washington Bar Association 271
Scott, James R., president, Old Dominion Bar Association 277
Jackson, Raymond A., National Bar Association 282

SUBMISSIONS

Letter from John W. Scott, Jr., Judicial Selection Committee, Old Dominion Bar Association, in favor of James R. Spencer 232
Letter from Alex T. Howard, Jr., resigned membership to the Athelstan Club in Mobile, AL 241
Letter from John L. Napier, resigned membership to the Caroliniana Ball 251
Points on D.C. courts 275
Profile of recently retired and sitting judges on the District of Columbia circuit of appeals 276
Biographies 282

ALPHABETICAL LISTING OF NOMINEES FOR FEDERAL APPOINTMENTS

Anderson, Joseph F., Jr., U.S. district judge, district of South Carolina 244
Burns, Arnold I., Deputy Attorney General of the United States 111
Conway, John E., U.S. district judge, district of New Mexico 92
Davies, John G., U.S. district judge, central district of California 40
Dubina, Joel F., U.S. district judge, middle district of Alabama 139
Duggan, Patrick J., U.S. district judge, eastern district of Michigan 238
Fawcett, Patricia C., U.S. district judge, middle district of Florida 6
Ginsburg, Douglas H., U.S. circuit judge, District of Columbia circuit 236
Graham, James L., U.S. district judge, southern district of Ohio 204
Henderson, Karen L., U.S. district judge, district of South Carolina 76
Hittner, David, U.S. district judge, southern district of Texas 24
Howard, Alex T., Jr., U.S. district judge, southern district of Alabama 239
Jensen, D. Lowell, U.S. district judge, southern district of California 79
Kay, Alan C., U.S. district court judge, district of Hawaii 142
Kosik, Edwin M., U.S. district judge, middle district of Pennsylvania 51

Page
Lechner, Alfred J., Jr., U.S. district judge, district of New Jersey 26
McQuade, Richard B., Jr., U.S. district court judge, northern district of Ohio ... 144
Napier, John L., judge, U.S. Claims Court 248
Norris, Alan E., U.S. circuit judge, sixth circuit 21
O'Scannlain, Diarmuid F., U.S. circuit judge, ninth circuit 202
Porter, James Kenneth, U.S. district judge, eastern district of Tennessee 206
Selya, Bruce M., U.S. circuit judge, first circuit 237
Simpson, Charles R., U.S. district judge, western district of Kentucky 105
Smalkin, Frederic N., U.S. district judge, district of Maryland 209
Spencer, James R., U.S. district judge, eastern district of Virginia 242
Stiehl, William D., district judge, southern district of Illinois 90
Trott, Stephen S., Associate Attorney General of the United States 146, 148
Weld, William F., Assistant Attorney, Criminal Division, Department of Justice 148, 163
Wiese, John Paul, judge, U.S. Claims Court 253
Wilkins, William W., Jr, U.S. circuit judge, fourth circuit 72
Williams, Stephen F., U.S. circuit judge, District of Columbia circuit 35
Woodlock, Douglas P., U.S. district judge, district of Massachusetts 29

CONFIRMATION HEARING ON PATRICIA C. FAWSETT

WEDNESDAY, MAY 7, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:10 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators McConnell and Simon.

Staff present: Duke Short, chief investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

We meet today to hold a hearing on a U.S. District Judge, Patricia C. Fawsett of Florida, to be a U.S. District Judge for the middle district of Florida. Mrs. Hawkins I believe recommended her for this position, the President has appointed her, and Senator Chiles has approved the nomination. Senator Chiles may come in. If he does, we will give him a chance to speak.

We have a letter here from Mrs. Hawkins highly endorsing you, saying a lot of nice things about you. So without objection, we will put that in the record.

[The letter follows:]

PREPARED STATEMENT OF SENATOR PAULA HAWKINS

It is my pleasure to introduce to the Senate Judiciary Committee Patricia Fawsett, who has been nominated by President Reagan to serve as United States District Judge for the middle district of Florida. Patricia Fawsett has the attributes of an outstanding federal judge—an admirable legal education and an excellent reputation as a practicing attorney.

Patricia Fawsett's achievements demonstrate her talent and expertise in law, and I greatly admire her for her abilities. She currently is a partner in the law firm of Akerman, Senterfitt & Edison in Orlando where she heads the law firm's civil litigation section. She is a member of the American Bar Association and an elected member of the Florida Bar Board of Governors. Her legal activities include serving as president of the Orange County Bar Association (1981-1982), membership in the Association of Trial Lawyers, and an executive of the Florida Council of Bar Association Presidents. Her involvement in legal associations and related activities is much too extensive for me to elaborate on each one, but she has worked at both the local and the state level demonstrating consistently her ability to serve today as a strong and effective federal judge.

Patricia Fawsett knows the law and understands human beings, their frailties, and an individual's responsibility under the law. Above and beyond her legal involvement, she actively participates in community affairs. She is involved in a number of civic organizations including serving as Commissioner of the Greater Orlando Crime Prevention Association, Director of the Orlando Area Chamber of Commerce, a Trustee of Loch Haven Art Center, and a member of the Children and Youth Network Advisory Council. She was awarded Business Woman of the Year (1981) by Orlando Business and Professional Women and the Downtown Orlando Business District voted her Outstanding Professional Woman (1982).

Patricia Fawsett graduated from the University of Florida College of Law where she was graduated first in her class. While at law school she served as Editor of the Law Review, wrote two published works and received various awards for her academic achievements. She is also a member of Pi Beta Kappa.

We have in Patricia Fawsett an exceptionally qualified woman, perfectly suited for this federal judgeship. I feel honored to know such a capable and hard working woman and it is my pleasure to recommend her to you today.

The CHAIRMAN. We have a letter from the Orange County Bar Association endorsing you, signed by Eloise O. Fox, executive director, and they passed a resolution officially endorsing you.

[The letter follows:]

ORANGE COUNTY BAR ASSOCIATION
880 N ORANGE AVENUE
SUITE 100
ORLANDO, FLORIDA 32801
(305) 422-4551

AWRENCE J PHALIN
PRESIDENT
JOHN E FISHER
VICE PRESIDENT
JAMES M RUSS
SECRETARY
MICHAEL P. McMAHON
TREASURER
C JEFFERY ARNOLD
EX OFFICIO

EXECUTIVE COUNCIL
BRUCE B BLACKWELL
ROBERT F HIGGINS
JAMES A "SKIP" FOWLER
LAWRENCE G MATHEWS
W SCOTT GABRIELSON
KIRK N KIRKCONNELL
JOHN MARSHALL KEST
WILLIAM B BARNETT
CHARLES T WELLS
ELOISE O FOX
EXECUTIVE DIRECTOR

April 11, 1986

Hon. Strom Thurmond, Chairman
Committee on Judiciary
United States Senate
Washington, D. C. 20510

Re: Patricia C. Fawsett

Dear Senator Thurmond:

The Orange County Bar Association is proud and pleased that the President has nominated Patricia C. Fawsett for the position of United States District Judge, Middle District of Florida, Orlando Division.

At its meeting on April 8, 1986, the Executive Council of the Orange County Bar Association passed a Resolution in support of her nomination and urging expediency in approving same. The Resolution is enclosed herewith.

I can assure you that any effort to expedite approval of Patricia C. Fawsett's nomination will be greatly appreciated by the entire membership of the Orange County Bar Association.

Respectfully,

Eloise O. Fox

Eloise O. Fox
Executive Director

EOF/tmk
Enclosure

c: Lawrence J. Phalin, Esq.
James M. Russ, Esq.

BE IT RESOLVED:

The Orange County, Florida, Bar Association, comprised of more than fifteen hundred lawyer-members, wholeheartedly supports and endorses the presidential nomination of Mary Patricia C. Fawsett for the position of United States District Judge, Middle District of Florida, Orlando Division.

This federal judicial vacancy at Orlando, Florida has existed for more than fifteen months and has caused a great backlog of pending federal cases. Now that the President has made his nomination, the duty is on the United States Senate to act on this nomination.

Therefore, the Orange County Bar Association urges the United States Senate, and its individual members, to immediately act upon and approve the nomination of Mary Patricia C. Fawsett for the position of United States District Judge, Middle District of Florida, Orlando Division.

DATED this 8th day of April, 1986, at Orlando, Orange County, Florida.

Lawrence J. Phalin, President

ATTEST:

James W. Russ, Secretary

The **Chairman**. You might stand up now and be sworn. Will the testimony you give in this hearing be the truth, the whole truth, and nothing but the truth, so help you God?

Mrs. **Fawsett**. Yes.

The **Chairman**. Have a seat. Mrs. Fawsett, do you have any family or friends you would like to introduce?

Mrs. **Fawsett**. Yes, Senator, I do. I would like to introduce my mother, Mary Combs. This is her first trip to Washington since she became a U.S. citizen. I would like to introduce my daughter, Suzanne Marise Fawsett, age 9, from Orlando, and my son, Chase Fawsett, age 3, and my friend, Linda Murrell, who was in Washington and wanted to come over. She works at my law firm.

The **Chairman**. I welcome you all here today. I believe you obtained a bachelor of arts degree from the University of Florida. You attended the University of Vienna, is that right?

Mrs. **Fawsett**. Yes, sir.

The **Chairman**. The University of North Carolina. A master of arts degree from the University of Florida. Emory University. University of Florida law degree. You attended several colleges, didn't you?

Mrs. **Fawsett**. Yes, sir.

The **Chairman**. I see Senator Chiles has now come in. Senator Chiles is the able senior Senator from Florida and we would be pleased to hear from Florida, and we would be pleased to hear from him at this time. I know he is busy and wants to get back.

STATEMENT OF HON. LAWTON CHILES, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator **Chiles**. Mr. Chairman, I appreciate it very much. I am pleased to introduce Mrs. Patricia Fawsett today, a fellow Floridian who has been nominated to serve as a U.S. district judge for the middle district of Florida. I believe her to be a fine candidate for this appointment. She received her juris doctor degree from the University of Florida in 1973, and she earned a master of arts in teaching in 1966, and a bachelor of arts in 1964, also from the University of Florida. She worked for several years as a college instructor, and after law school she joined the law firm of Akerman, Senterfitt & Edison, in Orlando, working as an associate from 1973 to 1978 and as a partner from 1978 to the present.

Mrs. Fawsett certainly has an exceptional record in law school. She received the Richard R. Irvin Award for the outstanding graduate of 1973, and the annual Corpus Juris Secundum Award for a student making the most significant contribution to legal scholarship. She also served as editor of the law review, authoring two published works, and she graduated first in her class for both the semester and the year. She was elected in 1984 to the board of governors of the Florida bar as a representative of the ninth judicial circuit, and has served as president of the Orange County Bar Association. She has served on the Supreme Court of Florida Civil Jury Instructions Committee. Her legal practice has focused on civil litigation. She has handled cases involving breach of contract, class action suits, malpractice, probate and antitrust actions, and throughout her career she has continued to do pro bono work for her local legal aid society. She was instrumental in establishing a Guardian Ad Litem program in Orange County for juveniles who are victims of abuse.

Given her accomplishments and her excellent record of service to her community, I certainly urge the committee to act favorably on her nomination.

Mr. Chairman, I would also like to introduce into the record a statement by Senator Paula Hawkins who is certainly responsible for——

The CHAIRMAN. We just put a statement in the record which is that same one, I guess.

Senator CHILES. You did? Wonderful. I am sure that is the one.

The CHAIRMAN. Thank you very much.

Senator CHILES. I know that Senator Hawkins would like to be here in person. She is sorry that she cannot be here on this appointment.

The CHAIRMAN. Thank you very much, Senator. I appreciate your presence and your eloquent testimony on behalf of this nominee.

Senator CHILES. Thank you.

The CHAIRMAN. Senator McConnell, I understand you cannot stay long and you wanted to make a statement?

Senator MCCONNELL. Yes, Mr. Chairman. Thank you very much. I just wanted to stop by and congratulate Mrs. Fawsett for her nomination, and I look forward to being able to support it. Thank you very much.

Mrs. FAWSETT. Thank you very much.

TESTIMONY OF PATRICIA C. FAWSETT, A NOMINEE TO BE A U.S. DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF FLORIDA

The CHAIRMAN. Mrs. Fawsett, you have been a practicing attorney I believe since 1973. You have been with the firm of Akerman, Senterfitt & Edison. You were an associate there from 1973 to 1978, and a partner there from 1978 to the present. Is that right?

Mrs. FAWSETT. Yes, Senator.

The CHAIRMAN. In reviewing your file, I noted that your litigation experience has been entirely civil in nature. Now you have been nominated to be a U.S. district judge for the middle district of Florida. Do you feel that your lack of criminal trial experience will in any way hinder you in the performance of your duties as a Federal judge?

Mrs. FAWSETT. No, sir. I have not had criminal trial experience, but I am not a stranger to hard work, either. I feel that I will take a very short time to catch up. I have already started doing that in the hope that I will be confirmed by this committee.

I have been sitting in the Federal court observing criminal procedures, and I have done a great deal of reading, including the recent recommendations from the Commission on Uniform Sentencing and the other matters that have been sent to me by the Judicial Center. I also feel that my wide ranging civil litigation practice will carry over and help me.

The CHAIRMAN. You have had civil litigation experience?

Mrs. FAWSETT. Yes, sir.

The CHAIRMAN. You have been a member of the bar for 13 years, I believe?

Mrs. FAWSETT. Yes, sir.

The CHAIRMAN. Just a young woman.

Mrs. FAWSETT. Thank you, sir.

The CHAIRMAN. Mrs. Fawsett, would you tell the committee what procedures you will follow in determining any potential conflicts of interest, and how you intend to resolve them.

Mrs. FAWSETT. I believe the judicial code that is approved by the ABA and the statute, which I believe is 28 U.S.C. 455, delineate the areas in which a judge must recuse himself, or herself, and I would certainly follow those. I would recuse myself of course in any case in which I had a financial interest, or in which any member of my home, had a financial interest, in any case that I was to be a witness, in any case that I had knowledge of the facts, and in any case that was in my law firm up to the time I may be fortunate enough to be confirmed for the bench.

And I think that in the cases in which the appearance of impropriety might arise, I would certainly consult with all counsel involved and determine whether I should be recused.

The CHAIRMAN. Mrs. Fawsett, the State of Florida is continuing to experience a major influx of illegal drugs. This is a problem that often requires drastic action. Many drug dealers consider large fines merely the "cost" of doing business. Would you give the committee your views on penalties that should be imposed for second and third time drug violaters.

Mrs. FAWSETT. The State of Florida has been particularly hard hit by the influx of drugs, and in the case of recidivists I believe that the maximum penalties provided by law are appropriate.

The CHAIRMAN. Mrs. Fawsett, what kind of guidelines, if any, do you feel a judge should follow in determining the suitability of Federal intervention into State affairs?

Mrs. FAWSETT. I believe under the 10th amendment those rights not specifically reserved to the Federal Government, or not prohibited to the States, belong to the States, and therefore, the Federal courts simply should not be involved in intervening in State affairs. I think the court should be involved in applying the law, whether it is a statute, or a treaty, or the Constitution, to the facts and applying case precedents to the facts, and that it is an improper function of the court to become involved in areas that are within the domain of the legislatures, or the States per se.

The CHAIRMAN. Mrs. Fawsett, in response to a portion of the committee questionnaire on judicial activism, you stated, in part: "The serious case overload facing the judiciary today has been in part a problem of the trial court's own making." Would you tell the committee what actions by the courts, in your opinion, have led to the case overload within the judiciary. Are they not working long enough hours, or is it inefficiency in cooperation, or, what do you attribute it to?

Mrs. FAWSETT. First, let me state that I feel that I have had the good fortune to practice before some of the finest State and Federal court judges there are, and that most judges are cognizant, not only of their duties in the administration of justice, but also of the opportunities for case management and moving cases along so that justice is not delayed.

What I meant by my statement was that there are times in which the courts do not strictly adhere to requirements such as the plaintiff being required to show jurisdiction in the court, or, the requirement that courts should only decide cases that involve actual controversies. Courts sometimes go into areas where there are hypothetical questions, or the issue is moot, or the plaintiff does not have standing or they decide a case and apply an opinion in a much broader context than the actual facts that are presented to them require. Instead of applying the law to those facts, they go beyond that and eventually end up giving a broader social or political statement, which is also an improper function. And I believe in doing so, courts often increase their own caseload.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. Thank you, Mr. Chairman. Mrs. Fawsett, first of all, I noted, as I glanced through your background, that you have more legal experience than many previous nominees, and you also received a well-qualified opinion from the bar association. That speaks highly of you.

I also notice that the young man, who I assume may be your son, is wearing a bow tie. You are starting him off very well.

Mrs. FAWSETT. Senator, he asked me to ask you where you buy yours, so he can increase his wardrobe.

Senator SIMON. He and I will exchange information afterward.

Mrs. FAWSETT. OK.

Senator SIMON. I notice that you were, for a while, a Commissioner on the Ninth Circuit Judicial Nominating Commission.

Mrs. FAWSETT. Yes, sir.

Senator SIMON. What did you look for when you were looking for a judge?

Mrs. FAWSETT. I looked for persons who had demonstrated an ability to be fair-minded and to listen to both sides of an issue before making up his, or her, mind. I looked for persons who were decisive and patient and who were students of the law. I also looked for persons who had reputations among their peers that would lead to commendation on the court and who would lend themselves to the dignity of the law. In other words, I looked for persons who would bring credit to the position of judge.

Senator SIMON. That is quite an order here: fair-minded, decisive, patient, student of the law, and having a good reputation.

Then now, you should know what my next question is going to be. Do you have these qualities?

Mrs. FAWSETT. I feel I have most of them. As to those that I need to improve on, I will definitely do so.

Senator SIMON. And let the record show, that the young lady sitting right in back of her nodded, very strongly, when I asked the witness whether she had these qualities.

What have you done as a person, or, as a member of the bar, to help those less fortunate?

Mrs. FAWSETT. Let me explain a little bit about our Orange County Bar Association. It is a voluntary bar association. We have about a 98-percent membership in that bar association, and a condition of membership in the bar association is that you will take two cases a year, pro bono, or you will make a monetary contribution to the legal aid society, which is sponsored by our bar association. So, I have tried to take pro bono cases every year. Many times my pro bono cases have run over into other years, and they have been very complex.

In addition to that, I have served on the Board of Trustees of the Legal Aid Society sponsored by the Orange County Bar Association, and at the State level I have helped form, and have been active as a member of the Board of Directors of the Florida Bar Foundation's Interest on Trust Accounts program. This is a State organization which takes interest from trust accounts and applies it to pro bono projects statewide.

Senator SIMON. I thank you. I have no further questions, Mr. Chairman.

The CHAIRMAN. I think that is all the questions I have. I congratulate you on your appointment by the President, your nomination by Mrs. Hawkins, and your approval by Senator Chiles, and we wish you well on the bench and hope you have a long and successful tenure.

Mrs. FAWSETT. Thank you, Senator.

The CHAIRMAN. We now stand adjourned.

[Whereupon, at 2:25 p.m. the committee was adjourned, subject to the call of the Chair.]

BIOGRAPHY

PATRICIA C. FAWSETT

NOMINEE, U.S. DISTRICT JUDGE, MIDDLE DISTRICT OF FLORIDA

Birth: August 21, 1943, Montreal, Canada (Dual American and Canadian citizenship until 1963) American, 1963-present.

Legal Residence: Florida.

Marital Status: Married. Charles Robinson Fawsett, 2 children.

Education: 1961-1963—University of Florida. 1964-1965—B.A. degree. 1963-1964—University of Vienna. 1965—University of No. Carolina. 1965-1966—University of Florida, M.A. degree. 1968—Emory University. 1970-1973—University of Florida, Law School, J.D. degree.

Bar: 1973—Florida.

Experience: 1973-present—Akerman, Senterfitt & Edison Associate (1973-1978) Partner (1978—pres.).

CONFIRMATION HEARINGS ON: ALAN E. NORRIS, DAVID HITTNER, ALFRED J. LECHNER, JR., AND DOUGLAS P. WOODLOCK

WEDNESDAY, MAY 14, 1986

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 2 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators McConnell and Simon.

Staff present: Duke Short, chief investigator; and Frank Klonoski, investigator.

OPENING STATEMENT OF SENATOR MITCH McCONNELL

Senator McConnell. The hearing will come to order.

I see that Senator Gramm is here on behalf of one of the nominees.

Senator, would you like to come forward and say a few words?

STATEMENT OF HON. PHIL GRAMM, A U.S. SENATOR FROM THE STATE OF TEXAS.

Senator Gramm. Mr. Chairman, let me thank you for allowing me to go first today so I can get on with the business of the people of Texas. I am honored to be here today to introduce my nominee for the southern district of Texas, David Hittner.

David Hittner is an outstanding jurist who has a distinguished record on the bench. He has distinguished himself from his days in college, where he was president of the student body, to a career in the judiciary which is without rival in his part of the State.

He is not just a distinguished jurist, but a great scholar of the law. He has written and lectured widely on legal matters relevant to the southern district of Texas. He has been engaged in numerous activities to promote the well-being of the people of the southern district of Texas.

On three occasions, he has been rated by the bar association in Harris County as the outstanding judge in his area.

I save my long speeches for the people who need it, Mr. Chairman. I do not believe that David Hittner needs a strong recommendation. I think his distinguished record speaks for itself. I think he will be an outstanding Federal judge, and I am very appreciative that President Reagan decided to appointed him and I commend his confirmation to you.

Senator **McConnell**. Thank you very much, Senator Gramm. We appreciate your coming by.

Senator **Gramm**. Thank you.

Senator **McConnell**. Judge Hittner, we will get back to you in a minute.

Senator Kennedy, would you like to introduce your nominee?

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator **Kennedy**. Thank you very much, Mr. Chairman. We have, I think, an outstanding candidate for our Federal district court judge for Massachusetts, but if I could indulge the committee, I think we would like to introduce the candidate's family who are here, and I would ask Mr. Woodlock if he would be kind enough to introduce them to the committee because this is a very special and important occasion and we are glad to have them.

Mr. **Woodlock**. Mr. Chairman, my wife, Patty; my son, Benjamin, who is 6 years old; my daughter, Pamela, who is 9 years old; my mother and father, Preston and Katherine Woodlock, of Sandwich, MA.

Senator **McConnell**. Thank you. We are glad to have you.

Senator Kennedy.

Senator **Kennedy**. Thank you very much, Mr. Chairman. I do not know whether this committee is empowered to give passes to those children who should be in school today and are here before our committee, but I would hope that it would be recognized that that would be a unanimous recommendation. If there is no objection to that, I think that our candidate can take that back to Massachusetts.

Mr. Chairman, I welcome the opportunity to be here to present to this committee a very outstanding nominee for the Federal district bench in Massachusetts. This candidate has had an outstanding record academically, and also in public service and the private sector.

I want to point out initially the fact that he was a graduate of Yale University does not exclude him from consideration by this committee for this very special and significant position.

In all seriousness, he received his law degree from Georgetown, was active in the law review process there, notes editor, graduated in the very top percentage of his class, clerked for one of our most distinquished judges, Judge Murray, in Massachusetts, whom I had the good opportunity to recommend to the Senate, who had a very distinguished record on the Federal bench and was extremely active in judicial activities and made a very important contribution to the cause of justice in our society.

After clerking for Judge Murray, Mr. Woodlock went to serve as an assistant U.S. attorney for 4 years. I think the time that was spent in that position is indicative of his commitment to public service. I think all of us are appreciative of the talented individuals who serve as U.S. attorneys; many do, and we are all enriched by it. But I think the fact that he served for 4 years shows his very strong commitment to public service and the cause of justice.

He received the "Director's Award" from the director of the executive office of U.S. Attorneys in Washington for the successful completion of prosecution of a number of different political corruption cases, and I think that also is very important and reflective of his commitment.

Since that time, he has served as a partner in Goodwin, Procter & Hoar, one of the very significant and important law firms in our Commonwealth. He also chairs the Committee for Public Counsel Services, which oversees the assignment and financing for indigent representation in Massachusetts State courts.

His distinguished academic career and distinguished commitment in public service have demonstrated his wide range of different interests. As a very successful partner in one of our best law firms, he never lost sight of his commitment to public service.

I think we will be very much enriched by his service on our Federal bench. I have taken a very deep personal interest in the quality of those that serve on our Federal bench during the time that I had the opportunity to make recommendations under a previous administration, and I recommend without hesitation Douglas Woodlock for this important responsibility and look forward to his passage of this committee and, hopefully, speedy confirmation in the Senate.

I thank the Chair.

Senator McConnell. Thank you very much, Senator Kennedy. We appreciate your coming.

I see that Senator Bradley and Senator Lautenberg are here, and we will get back to you in a minute, Mr. Woodlock.

Senator Bradley and Senator Lautenberg, would you come on up, on behalf of Judge Lechner?

Senator Bradley.

STATEMENT OF HON. BILL BRADLEY, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator Bradley. Thank you very much, Mr. Chairman. I would like to thank you and the ranking minority member, Senator Biden, for granting Senator Lautenberg and me additional time to review this nomination. Because Judge Lechner was not known to me prior to his nomination, I wanted to have ample time to solicit comments from the legal community in our State.

Based on the assessment of those who are familiar with Judge Lechner on the New Jersey Superior Court, both Senator Lautenberg and I have concluded that Alfred J. Lechner does indeed have the necessary qualifications to serve on the Federal district court in New Jersey, and I am pleased to be here today to say that.

As you know, there were some questions raised about the nomination. Because of that, Senator Lautenberg and I took the time to inquire perhaps more exhaustively about this nomination than prior judicial nominees from New Jersey who were already known to us.

The results of the inquiry have led me to conclude that there is absolutely no reason to object to this nomination; that soon-to-be judge Lechner is indeed qualified. In fact, I am aware that the Federal Bar Association of the State of New Jersey has sent to the committee a copy of the letter of support for this nomination which they submitted to Senator Lautenberg and to me.

You will note that they were effusive in their praise of Judge Lechner's credentials and capabilities. Similar comments have been sent to me by a number of other attorneys in our State.

So I have every reason to hope and to know that Judge Lechner will live up to the fine traditions of excellence, commitment to due process, and justice for all citizens and impartial enforcement of the law which have characterized the Federal district court in New Jersey.

It is a pleasure for me to be here today and convey these thoughts to the committee in support of Judge Lechner's nomination.

Senator **McConnell**. Thank you, Senator Bradley. Senator Lautenberg.

STATEMENT OF HON. FRANK LAUTENBERG, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator **Lautenberg**. Thank you, Mr Chairman. I am pleased to join with my colleague, Senator Bradley, in introducing Alfred J. Lechner, Jr., who is presently a judge on the Superior Court of the State of New Jersey and a nominee to serve on the Federal district court.

Mr. Chairman, at the outset, I want to thank you and the committee for your courtesies in giving us a little more time to review Mr. Lechner's appointment. As you know, information came to my attention and to the attention of Senator Bradley that raised a question about judicial temperament, and it was a serious matter and could not be ignored.

I felt it incumbent upon me to investigate thoroughly, and now that I have completed that investigation, I must tell you I feel comfortable commending Judge Lechner to you. He is a young man; he is 38 years old, but he has the legal skills and experience necessary to serve on the Federal bench.

Since January 1984, Judge Lechner has served as a trial judge in the law division of the Superior Court of New Jersey, and that is the principal trial court in our State. He started out conducting civil cases and then moved over to handle criminal matters.

He has developed a reputation in the short time he has sat on the bench as a smart, hard-working and well prepared judge. Before his elevation to the bench, he was engaged in the private practice of law in New Jersey for 9 years. Before that, he was an associate for 2 years at a Wall Street law firm.

Judge Lechner has tried cases in the State and Federal courts, and he has had a varied commercial civil practice. He is a skilled and experienced advocate. He is a certified civil trial attorney by the Supreme Court of New Jersey.

His service on the State court has given him a grounding in criminal law that he did not have in private practice. Judge Lechner has also had a distinguished academic career. He served as a member of the editorial board of the law review at Notre Dame, where he was graduated. He published a number of articles on banking law issues and other topics.

It was the unanimous view of the American Bar Association panel reviewing Judge Lechner's nomination that he was qualified to serve on the Federal bench.

Mr. Chairman, clearly, Judge Lechner appears to have the legal skills and experience to be a good member of the Federal court, but that is not all that is required. A Federal judge must also earn the respect of the public, and he has to maintain the appearance and the reality of fairness and impartiality.

Obviously, he has to treat with understanding those who appear before him. That includes advocates, whether they are private attorneys or government advocates. It includes parties, whether they are rich or poor. The public's respect for the judicial system depends on those qualities in our judges.

Mr. Chairman, for that reason, I was concerned when the temperament issue arose because I wanted to be sure that we had all that we could expect from a judge, and most of the comment, but not all, centered around Judge Lechner's decision dealing with a defense attorney on a contempt charge.

Well, Mr. Chairman, I looked into the case. Attorneys in New Jersey whom I respect looked into the charges, as well. They conducted interviews; they read transcripts. In the final analysis, there is insufficient cause to hold up this nomination.

Independently, the Association of the Federal Bar of New Jersey conducted its own investigation, and it has written a letter of endorsement of Judge Lechner's nomination. And I would request, Mr. Chairman, that the letter be made a part of the record.

Having said all that, I think the process was a positive one. It has highlighted the importance of the matter. We want Federal judges who are not only learned and skilled lawyers, but who have the demeanor and temperament that wins the public's respect.

That is a continuing concern of mine, and I trust that it is going to be a continuing concern for Judge Lechner.

Mr. Chairman, I would ask consent to have a letter written on behalf of attorneys in New Jersey to be included in the record.

The **Chairman**. Without objection.

[The following was received for the record:]

THE ASSOCIATION OF THE FEDERAL BAR
OF THE STATE OF NEW JERSEY

550 Broad Street - 17th Floor
Newark, New Jersey 07102
(201) 622-3000

OFFICERS

William B. McGuire
President

Bruce I. Goldstein
First Vice President

Joel D. Siegal
Secretary/Treasurer

Vice Presidents

John J. Barry
James L. Cooper
Douglas S. Eakeley
S. Joseph Fortunato
Barry I. Fredericks
Lawrence S. Horn
Harold Kamens
Joseph H. Kenney
Allyn Z. Lite
Bernard M. Powell
Laurence Reich
William B. Scatchard, Jr
Richard D. Shapiro
William B. O'Shaughnessy
Daniel L. Rabinowitz

ADVISORY BOARD

Hon. Clarkson S. Fisher
Hon. Frederick B. Lacey
Hon. Herbert J. Stern
Hon. Maryanne Trump Barry
Hon. Anthony T. Augelli
Hon. Arthur S. Lane
Thomas F. Campion
W. Hunt Dumont
Jonathan L. Goldstein
John L. McGoldrick
Donald A. Robinson
Ronald M. Sturtz

April 24, 1986

Hon. Frank R. Lautenberg
United States Senator
Senate Office Building
Washington, D.C. 20510

Dear Senator Lautenberg:

This Association consists of members of the Bar, public and private practitioners alike, who practice regularly in the Federal Courts of this State.

Last Friday the press reported that questions relating to the judicial temperament of Honorable Alfred J. Lechner, Jr. had been raised by Bar Associations or members thereof which led Senator Bradley and you to request that action on Judge Lechner's nomination to be a Federal Judge be deferred. The Officers of this Association who were present at a Judicial Conference sponsored by the Association on that date met and agreed to undertake a review of this criticism in order to assist you in your deliberations.

As President of this Association, I established a Committee consisting of William J. Brennan, III, Immediate Past President of the New Jersey State Bar Association; Jonathan L. Goldstein, former United States Attorney for the District of New Jersey; Joseph H. Kenney, a former President of The Camden County Bar Association; Ronald M. Sturtz, a former President of this Association; and the undersigned.

The members of the Committee agreed that we would not confine ourselves to the issue of judicial temperament but instead we undertook to obtain information relating to the intellect, competence, integrity and work habits, as well as the impartiality or bias of Judge Lechner, in addition to his judicial temperament.

Our review consisted of interviews with a wide cross-section of Judges, practicing lawyers, prosecutors, public defenders, and Court related personnel. In all, approximately 21 persons were interviewed, following which our Committee convened to discuss the results. It should be noted that no person on this Committee is a social friend or acquaintance of Judge Lechner and none of us had any prior or pending cases before him.

Every person interviewed spoke in glowing terms of Judge Lechner's intellect, integrity and competence. Each person emphasized the fact that he is considered to be a dedicated, hardworking and absolutely impartial Judge. The lawyers whom we interviewed included representatives of the plaintiff's and defense bar in civil litigation and similarly, as indicated above, both elements of the criminal bar were included in our interviews. The Committee endeavored to inquire concerning any possible bias exhibited by Judge Lechner relating to sex, race, color or religion. To a person, the response was that he never demonstrated a hint of bias in any proceeding. Several of the attorneys and one court attendant are Black persons, and each stated that Judge Lechner demonstrated absolute fairness and never, at any time, showed any sign of bias or prejudice. Each also reaffirmed the belief that Judge Lechner was extremely fair.

Insofar as judicial temperament is concerned, there was unanimity of opinion that Judge Lechner runs a "tight-ship" and protects the decorum of his courtroom. However, he at all times demonstrates courtesy and treats lawyers with proper respect. He does insist upon promptness and he does expect attorneys to be prepared. Your Committee members echo those sentiments and believe that Judge Lechner should be lauded for his efforts along those lines. Judge Lechner is considered to be a very well organized jurist who brings great energy to the bench.

Members of the Committee have read the transcript of the proceedings which led to the finding by Judge Lechner of contempt on the part of an Assistant Public Defender. Since that matter is presently in the Appellate Division, we do not feel it appropriate to comment upon the situation other than to state that the Judge did provide a number of warnings to the defense attorney before reaching his ultimate conclusion of contempt.

Based upon the extensive review of the ad hoc Committee, I am pleased to advise you that the Officers of this Association unanimously recommend that you vote affirmatively on this nomination. The Federal bench in New Jersey desperately needs a person such as Judge Lechner to perform the vital duties of a District Judge. His dedication to thorough preparation as well as his steadfast adherence to the highest principles of justice lead us to conclude that he will be a splendid addition to an already illustrious Federal bench in New Jersey. We urge you to act quickly to support Judge Lechner's nomination toward the end that we may have a full complement of hardworking and able Federal jurists in our State.

Respectfully submitted,

Will B. McGuire

William B. McGuire
President

WBM/gm

[Newark Star-Ledger, May 1]

LAWYER GROUP BACKS LECHNER FOR JUDGESHIP

(By Robert Cohen)

WASHINGTON.—The New Jersey Association of the Federal Bar yesterday informed Sens. Bill Bradley and Frank Lautenberg that its members strongly support the nomination of state Superior Court Judge Alfred Lechner Jr. for a federal judgeship.

William McGuire, president of the association, said in a letter to the two New Jersey Democratic senators that an extensive review of Lechner's background and record shows he is a "dedicated, hardworking and absolutely impartial judge."

Moreover, McGuire said extensive interviews with some 21 lawyers, judges, prosecutors and public defenders has found no basis for concern about his judicial temperament.

"Insofar as judicial temperament is concerned, there was unanimity of opinion that Judge Lechner runs a 'tight ship' and protects the decorum of his courtroom," said McGuire.

"However, he at all times demonstrates courtesy and treats lawyers with proper respect. He does insist upon promptness and he does expect attorneys to be prepared."

The two New Jersey senators earlier this month asked for a delay in the Senate Judiciary Committee confirmation proceedings of Lechner because of concerns about his "judicial temperament."

Those concerns were based on a series of complaints about Lechner from a number of lawyers.

Bradley and Lautenberg have not discussed those complaints, but at least one is believed to involve Lechner's decision to jail a Union County public defender for contempt last month.

Bradley said through a spokeswoman that he "appreciates the input from the association" and will continue to "welcome all information" about the nominee. The spokeswoman said Bradley still has not made up his mind to the nomination.

Lautenberg issued a statement saying that the federal bar association represents an "important segment of the legal community in New Jersey, and its views carry great weight.

"The association's input is helpful and will have my careful consideration as I continue to review this important nomination," he said.

Lechner, 39, of Westfield, was nominated for the federal bench in New Jersey by President Reagan on April 8. He has been a Superior Court judge in Union County for two years, handling civil and, most recently, criminal matters.

Lechner has declined comment on the nomination controversy.

In the bar association letter, McGuire said that the "federal bench in New Jersey desperately needs a person such as Judge Lechner to perform the vital duties of a district judge.

"His dedication to thorough preparation as well as his steadfast adherence to the highest principles of justice lead us to conclude that he will be a splendid addition to an already illustrious federal bench in New Jersey," the letter to the senators said.

McGuire said the review of Lechner's qualifications was undertaken for the association by William Brennan 3d, a former president of the New Jersey State Bar Association; Jonathan Goldstein, the former U.S. Attorney for New Jersey; Joseph Kennedy, the former president of the Camden County Bar Association, and Ronald Sturtz, a former president of the federal bar association.

Senator **LAUTENBERG**. It is my expectation that Judge Lechner will become an outstanding member of the Federal judiciary in New Jersey. He has the skills, he has the experience, he has the intelligence, and I commend him to you.

The **CHAIRMAN** [presiding]. Senator Bradley, I believe you have already spoken for him.

Senator **BRADLEY**. Yes, I have, Mr. Chairman, and I thank you for the opportunity to come before the committee and endorse the nomination.

The **CHAIRMAN**. It is a pleasure to have you both.

I want to congratulate Judge Lechner upon being appointed by President Reagan to be a U.S. District Judge for the District of New Jersey. You just have one district, I believe, in New Jersey, do you not?

Judge LECHNER. Yes, sir.

The CHAIRMAN. I want to congratulate you on having the favorable comment and approval and the personal appearance here of both of your Senators, Senator Bradley and Senator Lautenberg, both of whom are held in high esteem.

If you will stand aside now, we will go ahead with the others.

Judge LECHNER. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, gentlemen, for your appearance.

Senator LAUTENBERG. Thank you, Mr. Chairman.

Senator BRADLEY. Thank you, Mr. Chairman.

The CHAIRMAN. Is Congressman Conte here? Someone said he had just come in.

Mr. CONTE. Yes, Senator

The CHAIRMAN. Come right around, Congressman. I know you are busy and it is a great honor to have you before this committee, such a distinguished Congressman. It is a pleasure to have you.

I believe you are speaking on behalf of Douglas P. Woodlock, of Massachusetts.

STATEMENT OF HON SILVIO CONTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. CONTE. First of all, let me say, Mr. Chairman, what a pleasure it is to be able to appear before your committee. I do not know of anyone that I have a higher regard and respect for than the chairman of this committee, Senator Thurmond—a great American and one of the great Senators of all time.

The CHAIRMAN. I appreciate those kinds words, and I assure you it is mutual.

Mr. CONTE. We also have here Andrew Caffrey, chief judge of the district court, in case vou would like to have him speak or confirm his endorsement of Doug Woodlock.

Mr. Chairman, it is a privilege and an honor and, for me, a true pleasure, to present before this committee the nominee for the Federal bench of the district of Massachusetts, my good friend, Douglas P. Woodlock.

Mr. Woodlock received his undergraduate degree from Yale University. He then moved on to Georgetown to begin his pursuit of legal studies, working his way through school as a reporter for the Chicago Sun Times and later as a legal clerk for the SEC.

He received his J.D. in 1975, graduating in the top 10 percent of his class, serving as article editor of the executive board of the Georgetown Law Journal.

Following that impressive beginning, Mr. Woodlock embarked on his professional career with a 3-year stint in the firm of Goodwin, Procter and Hoar in Boston, where he specialized in trade and corporate practice. He also represented the Boston School Committee in connection with desegration matters.

Mr. Woodlock's true mark in the legal field was made in the next 4 years in his service as assistant and special assistant U.S.

attorney in the office of my good friend, the widely respected U.S attorney for Boston, Bill Weld.

As a member of the special investigation unit, Mr. Woodlock prosecuted political corruption, white collar fraud, and large-scale narcotics distribution. As a testament to his achievement in that post, he received the 1982 Director's Award from the Director of the Executive Office of U.S. Attorneys in recognition of his fine work.

He completed his outstanding service with the U.S. attorney in April 1983, serving as a prosecutor of a major drug smuggling case that then was the longest criminal trial before the U.S. district court of Massachusetts.

For the past 3 years, Mr. Woodlock has returned to private practice with Goodwin, Procter and Hoar. He is a member of the Massachusetts bar; he is also qualified to practice before the U.S. district court for Massachusetts, the first circuit court of appeals, and the U.S. Supreme Court.

I think it is self-evident from this outstanding record that Mr Woodlock possesses the qualifications necessary to serve the country capably on the Federal bench, and I can vouch that his character is beyond reproach.

Confirmation of his nomination would be a high compliment to the Federal judiciary and a privilege for those of us within the jurisdiction of the U.S. district court of Massachusetts.

His appointment would also be something of a coming home, for Mr. Woodlock received his start in the profession as a law clerk to U.S. District Judge Frank Murray, of Massachusetts, in 1975.

It is a coming home 11 years later that those of us who know this fine American welcome and endorse wholeheartedly. I urge the committee to give the nomination of Douglas P. Woodlock your most favorable consideration.

Thank you, Mr Chairman.

The CHAIRMAN. Thank you very much, Congressman Conte. Again, I say we are delighted to have you here. Your words certainly carry great weight with this committee.

Mr. CONTE. Thank you, Mr. Chairman.

The CHAIRMAN. I congratulate you, Mr Woodlock, upon having the endorsement here of both your Senators—I believe they have approved you—and especially Congressman Conte, who is a good friend of this administration and a friend of the President, and I am sure had a lot to do with your appointment.

Thank you, very much.

Mr. CONTE. Thank you, Mr Chairman.

Mr. WOODLOCK. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Kerry is not here. If he comes in, we will hear from him.

Now, we will go back and start first with Norris, but I think we will swear you all at once. Judge Norris, of Ohio, will you stand up? Judge David Hittner, of Texas, will you stand? Judge Alfred Lechner, of New Jersey, will you stand, and Mr. Douglas Woodlock, would you stand and take the oath?

Will the testimony you give in this hearing be the truth, the whole truth, and nothing but the truth, so help you God?

Judge NORRIS. It will.

Judge HITTNER. It will.

Judge LECHNER. It will.

Mr. WOODLOCK. It will.

The CHAIRMAN. Now, if you will come around, Judge Norris, without objection we will place a short résumé of your career in the record.

I believe you received your LL.B. from New York University and your master's degree in law from the University of Virginia.

TESTIMONY OF ALAN E. NORRIS, OF OHIO, TO BE U.S. CIRCUIT JUDGE FOR THE SIXTH CIRCUIT.

Judge NORRIS. I expect to receive that on Sunday, Mr. Chairman.

The CHAIRMAN. On Sunday, I see. You are now living in what part of Ohio?

Judge NORRIS. In Westerville, OH, which is in the same county as Columbus, the capital city, Mr. Chairman.

The CHAIRMAN. You were born in Westerville?

Judge NORRIS. Yes.

The CHAIRMAN. You were admitted to the bar in 1960, and since that time you have been in private practice and instructor of law at—is it Otterbein College?

Judge NORRIS. Otterbein College, yes, sir.

The CHAIRMAN. City prosecutor of Westerville; Ohio House of Representatives. Now, you are a judge of the Ohio Court of Appeals.

Judge Norris, you have served as a judge of the Ohio Court of Appeals, the 10th district, I believe, since 1981, is that correct?

Judge NORRIS. Yes, I have; January of 1981.

The CHAIRMAN. This, I believe, is the State's intermediate court of appeals and hears appeals from all trial courts of record, is that correct?

Judge NORRIS. Yes, sir.

The CHAIRMAN. You also served as a member of the Ohio House of Representatives from 1967 to 1980. With this background, do you believe that changes in the law should be reserved to the legislature, whose members can be altered by the voters if the elected officials fail to reflect the values of society, or do you think judges have a right to make changes in the law?

Judge NORRIS. Mr. Chairman, Senator Simon, one of the wonderful things about having served in a legislative body before serving on the bench is that it gives one an opportunity to understand the policymaking role of a legislator.

As a judge, as a consequence, I have endeavored to be very circumspect in deferring to the law-making role of the Ohio General Assembly. I fully realize that the legislature makes the law and that my role as an appellate judge has been to interpret the law, as made by the general assembly, consistent with its legislative intent.

The CHAIRMAN. Judge Norris, I understand that in 1971 you were fined $100 for contempt of court. Would you please tell the committee briefly how this contempt charge arose, and did the contempt involve any breach of ethics or professional conduct?

Judge **Norris**. Mr. Chairman, Senator Simon, following the 1970 census, and pursuant to the mandate of the Ohio constitution, the State legislative districts in Ohio were reapportioned by a constitutional body called the "State Apportionment Board."

At that time, the Democratic Party enjoyed a majority on that board. When it was discovered that my home town of Westerville had been inadvertently omitted from the plan, the Ohio Republican Party asked that I serve as plaintiff in the party's lawsuit challenging that plan, since I had standing.

That suit was filed in the Ohio Supreme Court, and it was filed on the basis of challenging the plan under the antigerrymandering provision of the Ohio constitution. Our constitution vests original and exclusive jurisdiction in the Ohio Supreme Court for apportionment challenges.

I later learned after the suit had been filed that a Democratic Party-sponsored lawsuit had been filed in the Federal district court in Youngstown, OH, and that its objective essentially was to have the plan validated under Federal constitutional grounds.

I also later learned that the Federal court had entered a class action order several days after our lawsuit was filed, which included all registered voters in Ohio within the class, and enjoined members from litigating in any other court issues raised in the Federal court action.

I was advised by counsel that our action did not involve the issues raised in the Federal court action. However, Federal District Judge Frank J. Battisti disagreed and found my attorney and I had violated the class action order.

If I might, Mr. Chairman and Senator Simon, I will quote quickly from the transcript. Judge Battisti had this to say to me at that time:

> Mr. Norris, your role up to this date has been somewhat minimal, I agree, and your conduct in following the advice of counsel up to this date militates in favor of considerable mitigation. Therefore, for your part in this contempt, you are fined $100.

We were ordered to dismiss our action in the Ohio Supreme Court, and we did that. At no time did I feel that I was in disrespect or in disregard of any order of that court. At all times, I acted upon the advice of counsel.

Mr. Chairman, in direct response to your question, the proceedings that I have described did not in any way involve any breach of ethical conduct.

The **Chairman**. Judge Norris, how does a responsible judge go about the process of interpreting such seemingly open-ended constitutional provisions as the due process or equal protection clause?

Judge **Norris**. Mr. Chairman, Senator Simon, it seems to me that there are two levels of judicial construction of constitutional language. The first, where the constitutional language is very general in nature—a judge has more latitude to apply that language to circumstances that were not foreseen by the Framers of the Constitution.

The second level of judicial interpretation is that where the Framers used very specific language which had a clear meaning to the Framers. Then, as a judge, it seems to me that I am bound to apply the historical meaning of that language, as understood by the Framers. To do otherwise would amount to a judge amending the Constitution, a role which, as you realize, is reserved to the Congress and to the States.

The CHAIRMAN. Judge Norris, in response to a portion of the committee questionnaire concerning judicial activism, I believe you stated, in part:

> As a State legislator, I experienced firsthand the consequences of Federal court orders setting standards to be followed by the State in operating penal institutions. Those orders illustrated the inappropriateness of courts assuming a policymaking role, since the courts, in ordering State expenditures, were addressing only one isolated function of State government.

Judge Norris, what are the standards that you will use in deciding that your court had a continuing administrative responsibility to oversee the implementation of one of its orders?

Judge NORRIS. Mr. Chairman, Senator Simon, in my answer to the question, I was, of course, emphasizing my concern as a legislator that Federal courts in my State had sometimes usurped legislative and executive functions of the State and of the Federal Government.

It seems to me that it is imperative that judges exercise restraint and that they defer, whenever possible, to policy decisions made by legislative bodies, be they State or Federal, and where a policy decision by State government clearly collides with the Federal Constitution, then a Federal judge should adopt a supervisory role with the utmost caution.

An opportunity should first be given to State officials to comply with court orders before the court considers stepping in with direct supervision.

The CHAIRMAN. I think, sir, those are all the questions I have at this time.

Judge NORRIS. Thank you, Senator.

The CHAIRMAN. I now want to turn to the distinguished Senator from Illinois, Mr Simon.

OPENING STATEMENT OF SENATOR PAUL SIMON

Senator SIMON. Thank you verv much, Mr. Chairman. I am going to have to be leaving very shortly and I just want you to know we find no difficulty with any of the nominees.

I would add that one of the nominees, Mr. Woodlock, from Massachusetts, has two things going in his favor. One, he is a journalist by background, which is an exceptionally fine background. Second, he spent some time in the State of Illinois, both of which are great assets to anyone who is going to become a Federal judge

Judge Norris, I congratulate you on the "well qualified" rating that you received from the American Bar Association.

Judge NORRIS. Thank you.

Senator SIMON. Your background is a rich one, but I notice that for an organ called the Ohio Pharmacist, you wrote an article urging a new system of selection for Federal judges.

I assume you now think that the current system of selecting Federal judges has a little more merit to it.

Judge NORRIS. It has been suggested to me, Senator, that perhaps my perspective might change. I think, Senator, that article was one that also appeared in the national journal of the National Conference of State Legislatures.

I have been interested since being admitted to the bar in judicial reform. As you know, one of the movements in the States is adoption of the Missouri Plan, a form of merit selection and retention elections.

What I proposed in that article was adoption of this blending of the elective and the appointive systems of the Missouri Plan for Federal trial and circuit judges, not for the Supreme Court.

Senator SIMON. This has nothing to do with whether you are going to be approved or not, but, on reflection, if you were just, in theory, to pick the finest system of selecting district court judges or appellate court judges, what would you do?

Judge NORRIS. Well, I will have to confess, Senator Simon, that there is more merit in this system than I knew before, in the selection system under the Federal system.

Senator SIMON. I understand the reason for your modification of views.

Judge NORRIS. That is said in all modesty, you understand.

But I think at the time I wrote those articles, we were very concerned about some collisions that the States were experiencing. I think, certainly, for State governments, I still am convinced that the so-called Missouri Plan—merit selection and retention elections—is the best blending.

It allows a degree of independence for judges, and yet ultimate accountability with the voters. I would be willing, Senator, to subject myself to that system as a Federal judge if it were adopted.

Senator SIMON. Thank you I have no further questions, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator SIMON. As I indicated, the other nominees also all appear to be excellent and we have no problem with any of them.

The CHAIRMAN. Judge Norris, would you care to introduce your family or friends you have here?

Judge NORRIS. I would very much; thank you, Mr. Chairman. I have with me my daughter, Tracy, who has just finished her freshman year at Miami of Ohio; my aunt and uncle, Alan and Esther Schrader, who are residents of Annapolis, MD; and my law clerk, Mr. Jeffrey Hopkins.

The CHAIRMAN. We are glad to have all of you here.

I again congratulate you on your appointment and I hope you have a happy tenure of service on the bench.

Judge NORRIS. Thank you, Mr. Chairman. I very much appreciate your courtesy.

The CHAIRMAN. You are now excused.

Now, Judge David Hittner, of Texas, will you come around? Would you care to introduce your family or friends who are here?

TESTIMONY OF DAVID HITTNER, OF TEXAS, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF TEXAS

Judge HITTNER. I believe I am here by myself today, sir.

The CHAIRMAN. All right. We have a few questions here. I believe you received your law degree at New York University.

Judge HITTNER. Yes, sir.

The CHAIRMAN. You served a year in the U.S. Army; in private practice up until you became a judge in 1978, is that correct?

Judge HITTNER. Yes, sir.

The CHAIRMAN. You have been appointed district judge for the Southern District of Texas?

Judge HITTNER. That is correct, sir.

The CHAIRMAN. Without objection, a brief résumé will go in the record.

Now, Judge Hittner, you have served as a judge of the 133d Judicial District of Texas since 1978. This is a trial court of general jurisdiction with a preference to civil cases, I believe.

Judge HITTNER. Yes, Mr. Chairman.

The CHAIRMAN. Now, the President has nominated you to be a U.S. district judge for the Southern District of Texas. Would you tell the committee what will be the most rewarding aspect of serving in this capacity?

Judge HITTNER. Mr. Chairman, I think it is the same enjoyment and excitement, really, that I have serving as a State district judge. I enjoy the trial work, I enjoy the interaction with the attorneys, and I have really enjoyed my stay on the State trial court. Hopefully, the same thing would hold over as, subject to confirmation, I take the Federal bench.

It is the interaction between the jurors and the attorneys on a day-to-day basis that I hope will continue on the Federal bench as on the State bench.

The CHAIRMAN. Judge Hittner, as a U.S. district judge, a substantial number of cases that will be brought before your court will be criminal in nature. What steps have you taken to prepare yourself for the criminal caseload that awaits you?

Judge HITTNER. Well, Mr. Chairman, as a practicing attorney, I had limited experience in criminal law. However, I did handle one felony jury case on a pro bono basis and secured a positive decision by the jury in that situation.

Aside from occasional criminal matters as an attorney, I have chaired a number of criminal continuing legal education seminars. As a judge, continuing education is quite an interest of mine.

Before getting into any major criminal matters on the Federal side, I intend to make full inquiry and to observe criminal matters in other courts before taking on a direct criminal caseload in the Federal courts.

The CHAIRMAN. Judge Hittner, would you tell the committee what procedures you will follow in determining any potential conflicts of interest and how you intend to resolve them?

Judge HITTNER. Well, Mr. Chairman, I think the procedure that we go through to reach this point is quite educational, in that we find out every holding that we have and it is all now a matter of record.

Certainly, when any case comes in, that will be checked, and if I feel personally uncomfortable in a matter, I would recuse myself. If it would not affect me personally, I certainly would make it known to all counsel and leave it to their option whether or not a recusal would be in order in the case that there would be a conflict.

The **Chairman**. Judge Hittner, are there ever any circumstances under which a judge should attempt to establish new judicial precedent, and if so, what criteria would you consider in order to determine the propriety of reversing existing precedent?

Judge **Hittner**. Well, sir, I have a full respect both for the superior courts—in effect, in the Federal system, the U.S. Supreme Court and the U.S. courts of appeals—and certainly as a trial judge, for the Texas Supreme Court and the court of appeals in the State of Texas.

I think that a trial judge is controlled by the precedent, which is the law in the State, as determined by the appellate courts. In other matters, of course, I believe it is a legislative prerogative, and that is the proper place for determining what public policy is.

The **Chairman**. Thank you. I think that is all the questions I have to ask you. I want to congratulate you on having been appointed by President Reagan to this high position, and also congratulate you on having both Senators having approved you.

Judge **Hittner**. Thank you very much.

The **Chairman**. Both your Senators are very estimable gentlemen and highly regarded here in the Senate.

Judge **Hittner**. Thank you, Mr. Chairman. I was pleased to have Senator Gramm here earlier, and it is certainly an honor to be here in front of this committee at this time. Thank you, sir.

The **Chairman**. I hope you have a happy tenure on the bench.

Judge **Hittner**. Thank you very much, Mr. Chairman.

The **Chairman**. Now, Judge Lechner, if you will come around. Judge Lechner I believe you received your law degree from Notre Dame Law School.

TESTIMONY OF ALFRED J. LECHNER, JR., OF NEW JERSEY, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF NEW JERSEY

Judge **Lechner**. That is correct, Senator.

The **Chairman**. Who was the dean at the time that you received your law degree?

Judge **Lechner**. When I was there, former Judge Lawless was dean, and then Professor Murphy became dean on an interim basis, and Dean Link the last semester I was there.

The **Chairman**. Dean Manion was before your time, was he not?

Judge **Lechner**. Very much before my time, yes.

The **Chairman**. You practiced in private practice until you became a judge in 1984, judge of the Superior Court of Union County, is that right?

Judge **Lechner**. That is correct.

The **Chairman**. Without objection, a brief résumé will go in the record.

Now, Judge Lechner, you presently serve as a judge of the Superior Court of New Jersey, and this is a trial court of general jurisdiction, is it not?

Judge **Lechner**. Correct; yes, it is.

The **Chairman**. Is this unlimited in civil matters and the death penalty in criminal matters?

Judge **Lechner**. Yes, it is. It is the general trial level in the State of New Jersey.

The Chairman. Do you have the death penalty in New Jersey?

Judge Lechner. Yes, we do, Senator.

The Chairman. You have been nominated to be a U.S. district judge for the district of New Jersey. Do you foresee any difficulty in the transition from a State court to a Federal district court?

Judge Lechner. I do not anticipate there will be any difficulty in the transition. I have had significant trial experience both as an attorney and now as a judge for the last 2½ years.

The Federal Rules of Evidence are similar to those rules used in the courts of the State of New Jersey; many of the procedures are the same. I anticipate absolutely no problem in the transition.

The Chairman. Judge Lechner, I consider judicial temperament to be a prerequisite for a Federal judge. Would you give me your thoughts on this subject?

Judge Lechner. Judicial temperament is a key ingredient. Part of judicial temperament, as it would be defined, I think would include the concepts of patience, courtesy and decisiveness.

A judge has to be able to stand back, take a look at the situation, and not only handle all parties with impartiality, but be able to give that appearance as well. That is the important part of judicial temperament with regard to sitting on the bench, be it at the trial level or indeed at the appellate level.

The Chairman. I have seen some Federal judges flaunt their power and it struck me as very uncalled for—embarrass jurors, witnesses, lawyers. A judge has all the power in the world, and the more power a person has, I think the more caution he ought to exercise in using that power.

Judge Lechner. I agree, especially during a trial situation. During the trial situation, it is almost unlimited for that moment and the ability to cause embarrassment is almost unbridled. I agree with you, Senator.

The Chairman. Now, Judge Lechner, there have been concerns regarding your finding an assistant deputy public defender in contempt of court on March 19, 1986. Would you please explain to the committee the circumstances surrounding this incident?

Judge Lechner. Well, Senator, I have submitted to—I believe the committee has a copy of the transcript, but in brief we had a situation where I was rendering an opinion, and during the course of rendering the opinion, the attorney in question was not in accord with my decision.

The decision in written form was some 20 to 25 pages and I gave it from the bench. He expressed that displeasure in numerous ways which attacked, as I saw it, the dignity of the courtroom.

I warned him; he acknowledged receipt of the warning and, in effect, dared me to take appropriate action. I declined to do so and moved to another matter to defuse the situation. After a luncheon recess, the attorney expressed his apologies and regrets for that conduct

The very next day during the rendering of a second opinion in the matter, the attorney engaged in conduct more egregious in nature.

The Chairman. The same attorney?

Judge Lechner. The same attorney.

I cited him for contempt and gave him the opportunity to be heard as to his mental intent at the time, to be heard as to sentencing, and I imposed a sentence. Within about 10 minutes after the imposition of sentence, a senior member of the office of the public defender came to see me and asked whether I would be willing to vacate the jail portion of the sentence.

I indicated that I would do that and I would go even one further—substantially reduce the fine. He indicated that he was pleased with that response and he was sure he would be back with the attorney to apologize.

A few minutes thereafter, I received a phone call indicating the attorney was not interested in apologizing. Some 45 minutes thereafter, the most senior member of the office of the public defender came to see me with the same question. Would I be willing to vacate the 2 days in jail if he tendered an apology?

I said, of course I would; that I had given that information not a half an hour before that to another member of his office. Also, I volunteered that I would substantially reduce the fine.

The result was the same. He had called back a few moments after he went to see this attorney and passed along the information. The attorney was not at all interested in apologizing, notwithstanding the fact that the conduct was the very same that the attorney engaged in the prior day, but only on a more serious scale.

That is the sum and substance of it, Senator

The **Chairman**. And you held him in contempt at that time after he refused to apologize?

Judge **Lechner**. It was a summary contempt proceeding, yes. I was willing to vacate the jail portion of the sentence and substantially reduce the fine if the attorney apologized.

The **Chairman**. Judge Lechner, in response to a portion of the committee questionnaire on judicial activism, I believe you stated, in part:

> Effective grievance resolution is an approach which recognizes the narrow parameters of the issue presented and the avoidance of gratuitous advice or opinions on non-ripe or non-present issues.
>
> Any tendency by the judiciary to impose expanded duties or to implement far-reaching social change constitutes a threat to the electoral process and, in many instances, is tantamount to judicially-caused disenfranchisement.

Judge Lechner, where, in your view, does a conscientious judge draw the line between judicial decisionmaking and legislative decisionmaking, and what are the criteria that you would consider in resolving whether or not a decision was the type that should be made by a judge as opposed to an elected legislative body?

Judge **Lechner**. Senator, it is my view that a judge's job is to resolve disputes which are presented to the judge at the time. I do not believe that courts as institutions are suited to resolve broad-based social problems.

In my view, the best forum for changing the mores of society or the standards of society, or for providing for remedies for social problems, is in the legislature, where these can be debated and discussed and all the ramifications of it can be brought out.

It has been said that a representative owes to his constituents his industry, his knowledge, his experience and his judgment, but if he submits his judgment to the will of his constituents, he does them a disservice.

That is not true with regard to a judge, be it a State judge or a Federal judge. Judges are required and bound to follow the law as the law is passed by the legislature or, indeed, as interpreted by the appellate courts.

So it would seem to me that the issues presented should be the confining parameters for any judge.

The **CHAIRMAN**. I think that is all the questions I have. I want to congratulate you on your appointment by President Reagan and having the endorsement of both of your Senators here from New Jersey.

Now, do you have any family or friends here you would like to introduce?

Judge **LECHNER**. Yes. I would like to introduce my family to the committee; my wife, Gayle; my son, Brendan; my son, Coleman; my daughter, Mary Kathleen; my father, Alfred Lechner; my brother, Edward; my brother, David; his wife, Rita; and my niece, Sarah.

The **CHAIRMAN**. We are very pleased to have all of you here. I hope you have a happy tenure of service on the bench.

Judge **LECHNER**. Thank you, Mr. Chairman. I appreciate your comments.

The **CHAIRMAN**. Now, Mr. Woodlock, would you come around? I believe you received your B.A. degree from Yale College and your law degree from Georgetown University Law Center.

TESTIMONY OF DOUGLAS P. WOODLOCK, OF MASSACHUSETTS, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF MASSACHUSETTS

Mr. **WOODLOCK**. Yes, I did, Senator.

The **CHAIRMAN**. Without objection, we will put a brief resume of you in the record.

Mr. Woodlock, in reviewing your file, I note that you are chairman for the Massachusetts Committee for Public Counsel Service. This State agency, as I understand it, provides required legal representation in the Massachusetts State courts for indigent persons. Is that right?

Mr. **WOODLOCK**. That is correct, Senator.

The **CHAIRMAN**. Would you please tell the committee what advice you would give young attorneys concerning their responsibility in rendering this type of legal service?

Mr. **WOODLOCK**. Well, Senator, I think that it proceeds on at least three levels. The first is a dimension of professional responsibility. It seems to me that each attorney, as a member of the bar, has a responsibility to provide legal services for those who are unable to obtain such services through traditional economic channels.

Moreover, I think for the younger attorney, such service provides an opportunity to get experience in the courts dealing with evidentiary matters. And, under the system we have established through the Committee for Public Counsel Services, the attorney is provided with adequate training, adequate supervision, and an opportunity to come head to head with experienced lawyers, all for further professional development.

Finally, I think it is a matter of professional satisfaction. I myself have undertaken the representation of indigents. I have found it the most satisfying form of legal representation because I assisted a client who might otherwise be unable to obtain legal services.

The CHAIRMAN. Years ago when I practiced law, we did not have public defenders, but the judge would appoint some lawyer, generally one would volunteer. It was a very fine experience for the lawyer who volunteered or who served, but now most places have public defenders.

Mr. WOODLOCK. In Massachusetts, we have a mixed system, Senator. We have both private assigned counsel and 120 public defenders, employees, lawyers who are public defenders as regular employees.

The CHAIRMAN. What percent of the cases do they handle where one charged with a crime does not have a lawyer, and in what percent does the judge appoint counsel?

Mr. WOODLOCK. It runs roughly 50 percent of the cases in which a public defender or some form of appointed counsel is assigned. The judges do not appoint in the Massachuetts State system. The appointments come through the Committee for Public Counsel Services, of which I have been chairman.

The CHAIRMAN. I see. In other words, you will furnish a lawyer or you will get him a lawyer, if he does not have one, if he is not able to employ one.

Mr. WOODLOCK. That is correct.

The CHAIRMAN. This applies to the indigent people?

Mr. WOODLOCK. That is right.

The CHAIRMAN. Mr. Woodlock, from 1978 to 1983, I believe you were an assistant U.S. attorney for the district of Massachusetts.

Mr. WOODLOCK. That is correct, Senator.

The CHAIRMAN. How many Federal judges have you in Massachusetts?

Mr. WOODLOCK. There are 12 active places on the Federal district bench, including one vacancy which I hope to fill. In addition, there are three senior judges.

The CHAIRMAN. You have only one district, however?

Mr. WOODLOCK. That is correct.

The CHAIRMAN. How many U.S. attorneys do you have?

Mr. WOODLOCK. It is in the range of 50 right now. A single U.S. attorney, and with assistants; I believe 49 assistants.

The CHAIRMAN. During the time you were an assistant U.S. attorney, I believe you were a member of the special investigations unit charged with investigation and prosecution of crimes involving political corruption.

Mr. WOODLOCK. That is correct

The CHAIRMAN. Would you tell the committee your views on what actions should be taken to deter political corruption in our society?

Mr. WOODLOCK. Well, I think the experience in the district of Massachusetts is illustrative. First, we had very forceful U.S. attorneys in the two whom I served under, Ted Harrington, and the current U.S. attorney, William Weld.

In addition, they, in turn, had very committed heads of the political corruption unit. In my case, I served under Jeremiah O'Sullivan, who is now chief of the New England Organized Crime Strike Force and under Mark Wolf, who is now a U.S. district judge—both forceful personalities dealing directly with those issues.

Moreover, I believe that the Congress has given the U.S. attorney's office and the Department of Justice a number of excellent tools for dealing with those issues, and the financing to undertake long-term investigations

The result, I think, has been, over the period of time since Mr. Harrington and Mr. O'Sullivan and then Mr. Weld and Judge Wolf were involved in prosecuting political corruption, an increased willingness on the part of both public officials and individuals who are being importuned by corrupt public officials to come forward and assist in investigations.

Two of the investigations for which I received the Executive Director's Award illustrated that. In one, the chairman of the board of selectmen of the town of Danvers came forward after he had been offered a bribe of $50,000 for a cable TV franchise. He undertook an undercover investigation and we successfully prosecuted a former assistant district attorney in Massachusetts for bribery.

In another case, the head of a concrete company who was required to pay money to obtain a zoning variance in the city of Boston came forward. We undertook an undercover operation with his assistance and successfully prosecuted the senior administrative assistant to the Boston redevelopment agency for extortion.

In those cases, both individuals received the congratulations of the community, and I think others like them, both public officials and private individuals, who find themselves being prevailed upon by corrupt officials have shown a willingness to come forward.

So I think that it is a matter of creating an environment, having forceful individuals in charge of the program and, more than I can underscore, the assistance that the Congress has given in providing appropriate criminal statutes and support services for the Department of Justice.

The CHAIRMAN. Now, if you had to name one thing, what would you say, to deter political corruption?

Mr. WOODLOCK. Quite frankly, Senator, I think firm sentences.

The CHAIRMAN. So those who attempted to be corrupt with the public would know they will get a stiff sentence if they are convicted?

Mr. WOODLOCK. I think that is correct, Senator. There has been a perception—diminishing, I hope and believe—that white-collar crime should be dealt with differently and more leniently than other kinds of crime.

It seems to me, by contrast, that those individuals to whom much is given have much responsibility, and when they involve themselves in criminality, they ought to be held out to exemplary sentences.

I think if I have to choose one thing—and it is hard because I think there are a whole series of factors that have to be brought to bear—it is that: firm, exemplary sentencing.

The CHAIRMAN. Mr. Woodlock, how would you handle an instance in which counsel for one of the parties in your court was obviously not a skilled litigator or was not prepared to adequately represent the interests of his or her client?

Mr. Woodlock. I think, Senator, that the first thing is to deal directly with the attorney himself to solicit from him an understanding that perhaps he needs assistance in the courtroom; to the degree that he is unwilling or unable to recognize that need, then to communicate with his associates.

It seems to me that a judge has a responsibility to ensure that both sides are fairly represented in court. The one restraint, and an important restraint, is that it is for counsel to try the case and not for the judge.

But it seems to me that working first with counsel himself and then perhaps with his associates, whether in the U.S. attorney's office or in the practice of law, would, in 95 percent of the cases, secure effective assistance in the courtroom.

The Chairman. Mr. Woodlock, the phrase "judicial activism" is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority.

What does the phrase "judicial activism" mean to you?

Mr. Woodlock. Well, I think, Senator, at the core of my definition is an unwillingness on the part of the judiciary to recognize that theirs is a limited role under our Federal constitutional system.

In my questionnaire I quoted Judge Wyzanski's characterization of Learned Hand, who thought his "chief obligation to be the disinterested interpreter of other men's wills." It seems to me that the role of the judiciary in our system is, at least to the degree that it has been delegated to the courts, to implement the wills of other agencies and to make sure that the policies that are enunciated by other agencies are fulfilled.

That is a limited role. It does not require what has broadly been described as judicial activism. It seems to me that such a function properly reflects the limited role of the Federal judiciary.

The Chairman. Now, we have the separation of powers: the legislative to make the law, the executive to administer the law, headed by the President, and the judicial to interpret the law, headed by the Supreme Court.

Then we have the division of powers. The Federal Government, under the Constitution, has only those powers specifically delegated to it in the Constitution. The 10th amendment is very clear on that.

Do you agree with that?

Mr. Woodlock. I do.

The Chairman. Would you care to introduce your family and friends who are here?

Mr. Woodlock. Yes, Senator; my wife, Patty; my son, Benjamin; my daughter, Pamela; my mother and father, Mr. and Mrs. Preston Woodlock. And if I might, Senator, I would like to introduce Jeremiah O'Sullivan, who is the chief of the New England Organized Crime Strike Force of the Department of Justice.

I believe that Chief Judge Caffrey and Judge Wolf are present as well; finally, Mark Rhoads, who is the legislative vice president of the National Tax Limitation Committee, and a lifelong friend of mine.

The **Chairman**. We are very pleased to have all of you here.

Again, I congratulate you on your appointment by President Reagan, and I also congratulate you on having the favorable endorsement of both your Senators, and especially the endorsement of Congressman Conte, whom I hold in such high esteem.

Now, I believe you said there is a chief judge here who might want to say a word.

Mr. **Woodlock**. Yes, Senator, Chief Judge Caffrey.

The **Chairman**. Did you want to say something, Judge?

Chief Judge **Caffrey**. Senator, I want to say that it is an honor for me to represent my court before this committee, particularly when the chairman of the committee is a former law partner of my close friend from South Carolina, Charlie Simon.

I am here to endorse Mr. Woodlock's——

The **Chairman**. A former law partner of mine.

Chief Judge **Caffrey**. Yes; Charlie has told me that many times.

Senator, Doug Woodlock has appeared in my courtroom primarily representing first amendment interests, and has done a very fine, professional job protecting certain newspapers first amendment interests in disseminating their publications.

He also earned an excellent reputation while in the U.S. attorney's office. I have no reservations saying that all 11 of the Boston-based Federal district judges strongly endorse this nomination.

The **Chairman**. Well, thank you very much. We are very pleased to have that high endorsement coming from such a fine judge as you are.

Chief Judge **Caffrey**. Thank you, Senator.

The **Chairman**. I think that now completes the hearing. We will stand adjourned.

[Whereupon, at 3:02 p.m., the committee was adjourned.]

BIOGRAPHIES

Alan E. Norris

NOMINEE, U.S. CIRCUIT JUDGE, SIXTH CIRCUIT

Birth: August 15, 1935. Westerville, Ohio.

Legal Residence: Ohio.

Marital Status: Widower. Nancy Jeanne Myers, 2 children.

Education: 1953-1956—Otterbein College, B.A. degree. 1956—La Sorbonne, University of Paris. 1957-1960—New York University, School of Law, LL.B. degree. 1984-1985—University of Virginia, School of Law, LL.M. degree (expected, 1986).

Bar: 1960—Ohio.

Experience: 1961-1962—Vorys, Sater, Seymour & Pease, Associate. 1962-1980—Metz, Bailey, Norris & Spicer Associate (1962-1966), Partner. 1976-1980—Otterbein College, Instructor of Business Law. 1962-1966—Assistant Law Director and City Prosecutor, City of Westerville. 1967-1980—Member, Ohio House of Representatives. 1981-present—Judge, Ohio Court of Appeals, Tenth District.

David Hittner

NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF TEXAS

Birth: July 10, 1929. Schenectady, New York.

Legal Residence: Texas.

Marital Status: Married. Helen Mintz Hittner, 3 children.

Education: 1957-1961—New York University, B.S. degree. 1961-1964—New York University, School of Law, J.D. degree.

Bar: 1964—New York. 1967—Texas.

Military Service: 1965-1966—United States Army, Captain.

Experience: 1967—Houston Legal Foundation, Para-legal. 1967-1968—Lynch, Chappell, Allday and Hamilton, Associate. 1968-1972—Diamond and Totz, Associate. 1972-1974—Glassman and Hittner, Partner. 1974-1975—Glassman, Hittner and Cezeaux, Partner. 1975-1978—Hittner, Cezeaux and Salvato, Partner. 1978-present—Judge, 133rd Judicial, District of Texas.

ALFRED J. LECHNER, JR.

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF NEW JERSEY

Birth: January 7, 1948—Elizabeth, New Jersey.

Legal Residence: New Jersey.

Marital Status: Married—Gayle K. Paterson Lechner, 3 children.

Education: 1965-1969—Xavier University, B.S. degree. 1969-1972—Notre Dame Law School, J.D. degree.

Bar: 1972—New Jersey. 1973—New York.

Experience: 1972-1974—Cadwalader, Wickersham & Taft, Associate. 1974-1975—Sole practitioner. 1975—Mackenzie, Welt & Duane, Associate. 1976-1984—Mackenzie, Welt, Duane & Lechner, Partner. 1984-present—Judge, Superior Court, Union County, New Jersey.

DOUGLAS P. WOODLOCK

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF MASSACHUSETTS

Birth: February 27, 1947. Hartford, Connecticut.

Legal Residence: Massachusetts.

Marital Status: Married. Patricia M. Powers Woodlock, 2 children.

Education: 1965-1969—Yale College, B.A. degree. 1971-1975—Georgetown University Law Center, J.D. degree.

Bar: 1975—Massachusetts.

Experience: 1975—Securities & Exchange Commission, Office of Chief Counsel, Legal Clerk. 1975-1976—Law Clerk to Hon. Frank J. Murray, United States District Court, District of Massachusetts. 1976-1979—Goodwin, Procter & Hoar, Associate. 1979-1983—Assistant United States Attorney, District of Massachusetts. 1983-present—Goodwin, Procter & Hoar, Associate 1983-1984, Partner 1984-present.

CONFIRMATION HEARINGS ON: STEPHEN F. WILLIAMS AND JOHN G. DAVIES

WEDNESDAY, MAY 21, 1986

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 1:58 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators McConnell and Simon.

Staff present: Duke Short, chief investigator; Laurie Westley, chief counsel to Senator Paul Simon.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The **Chairman**. The committee will come to order.

We have met today to hold hearings on two judges: For U.S. circuit judge, Stephen F. Williams, of Colorado, to be United States Circuit Judge for the District of Columbia circuit; District Judge John G. Davies, of California, to be U.S. district judge for the central district of California.

Mr. Williams, do you want to come around? Come around and have a seat.

We will ask both of the nominees to stand and we will swear you both at one time.

Mr. **Short**. Raise your hands, please.

The **Chairman**. Do you swear that the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Williams**. I will.

Mr. **Davies**. I will.

The **Chairman**. Sit down, Mr. Williams.

Mr. Williams, do you have any family or friends here you want to introduce to the committee?

TESTIMONY OF STEPHEN F. WILLIAMS, OF COLORADO, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mr. **Williams**. Yes, I do. I would like to introduce my wife, Faith Williams; my son, Tim Williams; and my father, Dick Williams. Also Ed Kutler from Washington.

The **Chairman**. Thank you. We are glad to have you.

Now, I am going to place your brief résumé in the record.

I believe you attended Yale College and got your B.A. degree and at Harvard you got your LL.B. degree.

Mr. WILLIAMS. Yes, Senator.

The CHAIRMAN. You are a member of the Bar in New York and Colorado. You have been a member, an associate of the law firm of Debevoise.

Mr. WILLIAMS. Debevoise, Plimpton, yes.

The CHAIRMAN. Plimpton, Lyons & Gates. Assistant U.S. attorney, the southern district of New York; the University of Colorado School of Law, professor of law, UCLA School of Law, visiting professor, University of Chicago Law School, visiting professor. That, in brief, I believe is your résumé.

Mr. Williams, do you have any Senators here to endorse you?

Mr. WILLIAMS. No, I do not, Mr. Chairman.

The CHAIRMAN. Mr. Williams, you have been nominated to be a U.S. circuit judge for the District of Columbia circuit. As an appellate judge, you will be reviewing decisions of district court judges.

What criteria do you intend to use in reviewing these decisions and trial records?

Mr. WILLIAMS. Well, the basic criteria are the substantive law as I am able to ascertain it from the opinions of the Supreme Court. So far as the issues of fact are concerned, the criterion for review is the clearly erroneous standard.

The CHAIRMAN. I consider judicial temperament to be a prerequisite for a Federal judge. Would you give me your thoughts on this subject?

Mr. WILLIAMS. I think judicial temperament requires the ability to be calm, to listen to all sides of the argument, to deliberate carefully on and reason carefully through the arguments which have been made, and to reach a clear and firm decision.

The CHAIRMAN. I have seen some Federal judges intimidate lawyers or witnesses or people around the courtroom and I have always thought that was very unbecoming, a man who has all the power of a Federal judge to do that. How do you feel about it?

Mr. WILLIAMS. That sort of behavior seems to me utterly unacceptable, Senator, and has no place in any Federal courtroom or any other courtroom.

The CHAIRMAN. Mr. Williams, article V of the Constitution establishes the procedures by which the Constitution is to be amended or altered. Do you believe that article V specifies the only means by which the Constitution should be amended?

Mr. WILLIAMS. It is certainly the only means that I am familiar with.

The CHAIRMAN. Well, some judges have attempted to alter the Constitution, I think, in their own decisions. Congress, I think, has attempted to alter the Constitution in some of its laws they have passed. But personally I am a strict constructionist. I believe the Constitution says what it means and means what it says. And there is ways to amend it, but, for instance, we ought not to be going into the field of jurisdiction in the Congress unless those fields have been delegated to the Federal Government, to the Union. And they can be delegated by a constitutional amendment, but some Congressmen are not willing to wait and take time, and it does take time to do it.

Mr. Williams, we frequently hear the argument that courts act in response to various social problems because the legislature has failed to act on its own. How would you respond to this defense of an activist judiciary?

Mr. WILLIAMS. It seems to me that it is in no way a justification of an activist judiciary. I do not think that the courts are a well-designed institution for the resolution of social problems of that sort.

In the first place, they are an institution which is not responsive to the electorate. In the second place, they necessarily operate by means of principle, and most of our social problems do not lend themselves to resolution simply by the application of any principles which emerge from the Constitution. Third, they necessarily operate by means of precedent, which means that if the courts experiment with social policy it is very hard for them to alter that experiment. It requires an embarrassing retreat from the previous cases. Finally, the courts are not forums where all interests which may be affected by a decision can properly be heard.

So I think that the courts as an institution for the solution of social problems are altogether inadequate.

The CHAIRMAN. I have seen some here in the Congress take the position, well, the States will not do anything about it; therefore, the Federal Government has got to act.

My position is that it is up to the States, and if they want to inject the Federal Government into it, there is a way to do it, by amending the Constitution, but not to inject the Federal Government into a field where there is no jurisdiction under the Constitution.

Do you agree with that?

Mr. WILLIAMS. Well, I do agree, and the argument that you have quoted seems to assume that some particular thing has got to be done. And, of course, the question of what has got to be done is a matter which the Constitution has allocated to the different jurisdictions.

The CHAIRMAN. I have one more question, Mr. Williams. In response to a portion of the committee questionnaire regarding judicial activism, I believe you stated, in part, "It is my view that judicial invalidation of legislative judgments must be extremely rare."

Could you give the committee an example of judicial invalidation of legislation that you felt was appropriate and necessary?

Mr. WILLIAMS. Yes. I think the judicial invalidation de jure racial segregation has been entirely appropriate, a clear case where the Constitution, through the 14 amendment, calls for that result.

The CHAIRMAN. That is all the questions I have. You may have a seat in case some other Senators come in and wish to ask you some questions.

Thank you very much.

Mr. WILLIAMS. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Davies, if you will come around please. and Senator Wilson.

We are very pleased to have the able and distinguished Senator from California, Mr Wilson, here. I believe he wants to introduce you and say a few words about you.

We will now be pleased to hear from him.

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator WILSON. Thank you very much, Mr. Chairman. I am grateful for the courtesy of the Chair and members of this committee once again.

I do have the privilege, as you have indicated, Mr. Chairman, of introducing to the committee today a very distinguished trial practitioner from California. I will, in the interest of time, summarize the comments that I would like to make about John Davies.

I will just say that he has apparently always been a high achiever. He has always excelled, most notably here in the chosen profession of the law. But, I cannot help observing that he is perhaps even better known in some quarters for having excelled in the sport of swimming. In 1952, swimming for his native Australia, he won the Olympic Gold Medal in the 1952 Olympic Games in the 200-meter breaststroke. Since then he has been making waves in the practice of law.

He is a distinguished trial lawyer with a truly extensive background. His practice has included litigation in virtually all of the fields of liability work, such as product and professional liability and medical malpractice. He has been a distinguished litigant in the personal injury field, but also his experience has included domestic relations, and more recently in the past 15 years, he has given emphasis in his trial work to contracts, real property, securities regulation, copyright, and the criminal defense field.

He is extraordinarily well known in the Los Angeles area. The bench and bar there not only think well of him, but I think it is notable, Mr. Chairman, that Mr. Davies did not come looking for this appointment to the Federal bench. Rather, it was his reputation in the legal community, an outstanding reputation, that caused his name to be brought to me. And when I asked my judicial screening committee to approach him and to rate him, they gave him the highest possible rating, that of exceptionally well qualified.

His experience, as I have indicated, is diverse; consistent has been his performance. He has been involved in a number of celebrated cases. He represented the motion picture industry in the *Sony-Betamax* case, and his experience covers a very, very broad spectrum.

I think from the time that he left Australia to pursue his studies as both an undergraduate and his legal studies at the University of Michigan and his completion of those studies at UCLA, he has had an outstanding record. He is known to enjoy the kind of strong knowledge of the law and the judicial temperament that is required for superior service on the bench, and it is this background that has caused him to enjoy an enviable reputation with the lawyers and judges of Los Angeles County.

With him today are his family; his wife, his daughter, Ann, and his son, Jack. Mr. Chairman, in the interest of your time, I will not say more.

He is superbly qualified by temperament, by experience, by knowledge of the law to give distinguished service on the Federal bench.

The CHAIRMAN. Thank you very much.

Mr. Davies, I congratulate you upon not only being appointed by the President but having the high endorsement of Senator Wilson. And I believe Senator Cranston has approved your nomination, too.

Mr. DAVIES. Thank you.

[Prepared statement of Senator Alan Cranston follows:]

PREPARED STATEMENT OF SENATOR ALAN CRANSTON

Mr. Chairman, I am pleased that my colleague from California, Senator Pete Wilson, has recommended the nomination of John G. Davies to be U.S. District Judge for the Central District of California. Friends of mine who are lawyers in the Los Angeles area speak very highly of Mr. Davies' potential for the Federal bench; I, too, am delighted to express support for his appointment.

An Australian by birth, Mr. Davies received his law degree at U.C.L.A. in 1959, became a U.S. citizen in 1960 and was admitted to the California State Bar in 1961. Since that time, he has practiced law in Los Angeles in various capacities, currently as a partner in the Beverly Hills law firm of Rosenfeld, Meyer and Susman. He enjoys an excellent reputation among attorneys in the Los Angeles legal community, who value his intelligence, his dynamism, his compassion and, above all, his zeal to protect the rights of all citizens under the law.

I know John Davies' appointment would be well received in the central district. And, speaking from a Democrat's point of view, I appreciate his reputation as a progressive, nonpartisan advocate. I urge the committee to give Mr. Davies' qualifications favorable consideration and to recommend his speedy confirmation by the Senate. He has my full support.

The CHAIRMAN. Senator Wilson, it is a pleasure to have you here, and I know that you are busy. So if you want to be excused, or you can stay if you care to.

Senator WILSON. Thank you, Mr. Chairman. I would like to stay. However, I am due at the same meeting that the chairman is due at.

The CHAIRMAN. Yes.

Senator WILSON. So I will see you there.

The CHAIRMAN. I have to leave. I am going to ask Senator McConnell if he will take over. We have a few questions that Senator McConnell will propound to you.

Now, Mr. Davies, would you want to introduce your family to us before we leave, and your friends?

Mr. DAVIES. Yes. My wife, Marjorie Davies; my son, Jack; and next to him my daughter, Ann.

The CHAIRMAN. We are glad to have you here. I have already sworn both of you.

Senator Simon, we just finished Mr. Williams, but I asked him to wait. I thought you might come in and ask some questions. So I will now turn to you to propound your questions. I have an Armed Services meeting Senator Wilson and I both have to go to.

Senator MCCONNELL [presiding]. On the chairman's behalf, let me ask you, Mr. Davies, a couple of questions.

You have been a practicing attorney for 25 years. Now the President has nominated you to be U.S. district judge for the central district of California.

Do you foresee any difficulty in the transition from advocate to impartial jurist?

TESTIMONY OF JOHN G. DAVIES, OF CALIFORNIA, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

Mr. DAVIES. No, to answer the question, and the reason I believe there will be no difficulty is because of my trial experience. I have tried a great variety of cases and a great number in the 25 to 26 years that I have been practicing, and I have as a result of that been able to observe the manner in which a variety of judges, many judges, conduct themselves and comport themselves and manage their calendars and their courtrooms. And I believe that that experience will probably ease the transition.

Senator MCCONNELL. You have been engaged in general litigation in both State and Federal courts in the State of California. Do you believe litigants in State courts receive the same level of fairness, due process, and quality of justice as do litigants in the Federal courts?

Mr. DAVIES. I believe, based upon my experience personally and my observations of the courts of the State of California that, generally speaking, there is a reasonably high degree of competence in the California court system. One may, of course, be able to identify exceptions to that on an individual level, but I believe the general statement is true. California is fortunate in that respect. And I believe that level of competence is translated also, or contained therein, you will find a reasonably high degree of fairness within the system.

I look back at the cases that I have lost, and lack of fairness as a reason for a result that I had not hoped for is a reason that does not ever come to mind. I think we are lucky in that respect.

As for the Federal courts, I can only speak with any knowledge of the central district of California. My experience elsewhere is limited, although I have tried matters in both the southern district and the northern district of the State. But I would simply make the same comments about the Federal district courts in my State. They, too, seem to enjoy a reasonably high level of competence. And hand in hand with competence, in my opinion, goes fairness.

Senator MCCONNELL. Would you tell the committee what procedures you will follow in determining any potential conflicts of interest and how you intend to resolve them?

Mr. DAVIES. Well, I would imagine that there are two possible sources of conflicts; minimal, I must say. Maybe some ownership of stock in a few companies, and the other source, perhaps is relationship or my past relationship with the firm of Rosenfeld, Meyer & Susman. I have been a partner there for a number of years.

In the event that I observe the presence of a conflict or the potential for conflict, I believe it would be my duty to identify it, and it would be my further duty to make the litigants, through their counsel, aware of it and offer in some cases to recuse myself and in other cases to actually recuse myself without the input of the counsel for the litigants.

Senator MCCONNELL. In response to a portion of the committee questionnaire concerning judicial activism, you stated:

> I believe the judiciary, both Federal and State, has in many instances invaded the areas of government that rightfully should be occupied by the legislative and execu-

tive branches. Judicial activism does not seem to me to be easily defined nor easily identified. I believe it exists when the proper limits of judicial law-making are exceeded. The task is to determine those proper limits.

What in your mind would constitute the proper limits of judicial lawmaking?

Mr. DAVIES. Well, I believe it is difficult to identify them in a general fashion, and to make some general statement that would in all cases be a guide to the so-called proper limits of judicial lawmaking. But I believe that when the judiciary invades the proper provinces of other branches of Government, you will probably find an example of judicial activism, an example of the proper limits of judicial lawmaking being stretched.

In Senator Wilson's introduction, he referred to what is known as the *Sony* case, and I would point to that as an example of policymaking by a trial court. I believe that policymaking is an example of what I was trying to indicate in my answer to that question in the committee's questionnaire.

In that case, the Copyright Act, in my opinion, was ignored by the trial court, and the doctrine of fair use was tortured by the trial court for the purpose of coming to a decision that I believe was preordained. It was basically a policy decision, and that policy decision was—or at least it was an utterance of policy, and that utterance was that the private in-home use of the videotape recorder for noncommercial recording of copyrighted material off the public air waves was a proper use. I believe that that is the articulation of a policy that should be addressed by the legislature. I think that that is an example of a court exceeding what I consider to be the proper bounds of judicial lawmaking.

I hope that answers the question.

Senator MCCONNELL. Yes, thank you.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

If I may follow through, Mr. Davies, on the one question that was asked by Senator McConnell. You own 500 shares of Storage Equities, Inc. How would you handle a case before you involving Storage Equities, Inc.?

Mr. DAVIES. Well, I would think initially my inclination would be to recuse myself and not become involved.

I also think that that ownership creates nothing but a very tenuous relationship, and it would not in fact influence me in any way, shape or form, or to even the slightest degree. But being cognizant of the responsibility of a judge even where there is an appearance of conflict, I would consider it one's duty to reveal that fact to the litigants. If either litigant, or any litigant, in the dispute were inclined or hinted even that I should not judge the case, I certainly would not.

Senator SIMON. Has anyone in the process of your receiving this nomination asked you questions that you felt were in any way inappropriate?

Mr. DAVIES. The answer to that is a resounding no.

Senator SIMON. One of the things that the canons of ethics of the American Bar Association is that an attorney should help the disadvantaged.

Can you tell me what you have done in your legal background or personally to comply with that?

Mr. DAVIES. Yes, certainly. I am a partner in a reasonably large firm, and I have for 14 years been associated with and a partner in the firm. I have been a partner for 13 years.

The firm has a policy of allowing the associates to undertake pro bono work of their choice. We do not place any restrictions upon the choice of the work that they take, no ideological restrictions at all.

As a result, the firm accordingly sponsors and I as a partner directly sponsor that type of pro bono work which is currently ongoing and has been something that has been done for as long as I have been with the firm.

The associates tend to work for Public Counsel, the ACLU, the Beverly Hills Bar Association, which has a pro bono program.

Myself, I have always felt that I should make some contribution to the profession that has been so kind to me. My contribution, Senator, has been as follows: Some 16 or 17 years ago I was asked to serve without compensation as a volunteer on the Los Angeles Superior Court panel of arbitrators, and I have done that constantly for the last 17 years. That requires one or two evenings a month that I give to the county, basically, and I sit as an arbitrator and listen and judge cases that are filed in that court.

The objective, of course, is to relieve the burden on the court. I consider that my pro bono work, and I consider my contribution to the indigent and those who cannot afford the legal services that they need my support of the work that the associates in our firm perform for the ACLU, for Public Counsel, and other channels through which pro bono litigation seems to come.

Senator SIMON. Thank you.

Thank you, Mr. Chairman. Let me just add, I note you received a "well-qualified" rating from the American Bar Association. I congratulate you.

Mr. DAVIES. Thank you, Senator.

Senator MCCONNELL. Thank you, Senator Simon.

Congratulations, Mr. Davies, and that concludes the hearing.

Oh, I am sorry. Senator Simon, do you want to address any questions to Mr. Williams?

Senator SIMON. Yes, I would.

Senator MCCONNELL. Mr. Williams, would you come back, please?

Senator SIMON. Mr. Williams, I note that the American Bar Association gave you a mixed qualified/not qualified rating, coming out on the qualified side.

Do you have any comments or any reflections on why that might be the case?

Mr. WILLIAMS. Senator, as you know, the ABA does not give anything beyond the statements.

Senator SIMON. I understand that.

Mr. WILLIAMS. We do know that the ABA attaches a great deal of importance, almost exclusive importance, to litigation experience, and my litigation experience, though I think quite substantial, ended for the most part, with some exceptions, 17 years ago. I think they on that account discounted it.

I think in fact the experience that you get from litigation is something that stays with you your whole life and is something that does not become unimportant merely through the passage of time.

At the same time, the ABA pays very little attention to other activities; certainly scholarship and teaching are not matters that they regard as of consequence. As you know, Judge Posner received exactly the same rating as I did. I feel very proud to receive the same rating as he received.

Senator SIMON. Can you give me your views on the original intent doctrine?

Mr. WILLIAMS. To me the proposition about original intent is an acknowledgment that the Constitution is a written one and that the starting point, certainly, for any constitutional analysis is with the words, understood in light of the meaning that was attached to those words at the time of adoption. That does not mean that that is the end of constitutional analysis, but it is most certainly the beginning.

To the extent that it means more, I am not sure and I would be reluctant to set out on a general treatise on original intent at this point.

Senator SIMON. Well, to what extent will you feel bound by Supreme Court decisions?

Mr. WILLIAMS. Completely, Senator Simon. There is no doubt that the duty of a lower Federal judge is to apply the law as it exists, and that means the law as it has been found by the U.S. Supreme Court.

Senator SIMON. Just to clarify this, of you arrived at one particular conclusion through your original intent philosophy but the Supreme Court in the meantime had ruled in another direction, would you follow the decision handed down by the court?

Mr. WILLIAMS. There is absolutely no doubt in my mind, Senator, that it would be my duty to follow the law as interpreted by the U.S. Supreme Court.

Senator SIMON. You heard my question to the previous nominee about things you may have done to help the less fortunate in our society, pro bono work. Can you indicate what you may have done in that area?

Mr. WILLIAMS. Senator, I think the most significant thing, perhaps, was the work for 2 weeks in the summer of 1965 for civil rights workers in Mississippi trying to secure their legal rights. I have also represented some students in Colorado who were thrown out of school because of the length of their hair.

More important than that, really, I think, though, is that my life as an academic, which has been my work life for the past 17 years, I have written from what I hope to be an objective point of view, trying to clarify the law, trying to improve the law, and that effort was not done on behalf of any client. It was simply done in the interests of making the legal system better Those efforts, I hope, are ones which, to the extent they have any impact, will benefit everyone in the country, poor and nonpoor alike.

Senator SIMON. You were originally nominated for a somewhat different spot than the one you now have. Have you any reflections either on the change, why it took place, and also on the somewhat different jurisdiction that the court has here?

Mr. WILLIAMS. Well, I would say only this, really, that the result of the switch in some ways is to put me on a court, if I should be confirmed, for which I am in some ways better suited than the 10th circuit. One of my specialities as an academic has been administrative law, and administrative law is, after all, a principal specialty of the D.C. circuit.

In addition, or as part of that, really, I have done consulting for the Administrative Conference of the United States which monitors and tries to advance the development of administrative law. I have also done consulting for the Federal Trade Commission as part of its work trying to improve the substance of regulation.

So that those aspects of my background, I think, make the switch to the D.C. circuit a very suitable one.

Senator SIMON. I might mention for the record and for you, Mr. Williams, we have received a request from the American Bar Association to not act immediately until they take another look in view of the change in the original nomination. And I have requested of the chairman the possibility that we would have a second hearing pending the action by the bar.

Senator MCCONNELL. It is my understanding that the chairman is agreeable to that.

Senator SIMON. And the chairman has indicated very graciously that he would be agreeable to that.

Mr. WILLIAMS. I am sorry. That is an additional hearing here?

Senator SIMON. That is correct. Now, that is pending what we hear from the bar association, but there may be a second hearing.

Mr. WILLIAMS. Let me just say on that subject that, as you know, before the ABA embarks on its work, the candidate fills out a very lengthy questionnaire; I think in my case about 35 pages. And after that, the various activities that the candidate has been through are researched by whoever is put in charge of it.

I have no reason to think that the research done by the ABA person in charge of my case in any way slighted my activities that are connected with administrative law or the District of Columbia.

Senator SIMON. And I have no basis for assuming that either, but we have received this request and the bar associate does provide an important contribution to this committee in screening each nominee.

And so I have made that request to the chairman. Thank you, Mr. Williams. Thank you, Mr Chair.

Senator MCCONNELL. Thank you, sir.

Mr. WILLIAMS. Thank you, Senator.

Senator MCCONNELL. That concludes the hearing.

[Whereupon, at 2:33 p.m., the committee was adjourned, subject to the call of the Chair.]

BIOGRAPHIES

STEPHEN F. WILLIAMS

NOMINEE, U.S. CIRCUIT JUDGE, DISTRICT OF COLUMBIA CIRCUIT

Birth: September 23, 1936. New York, New York.
Legal Residence: Colorado.

Marital Status: Married. Faith Morrow Williams, 4 children.

Education: 1954-1958—Yale College, B.A. degree. 1958-1961—Harvard Law School, LL.B. degree.

Bar: 1962—New York. 1977—Colorado.

Experience: 1962-1966—Debevoise, Plimpton, Lyons & Gates, Associate. 1966-1969—Assistant U.S. Attorney, Southern District of New York. 1969-present—University of Colorado, School of Law, Professor of Law. 1975-1976—UCLA School of Law, Visiting Professor. 1979-1980—University of Chicago Law School, Visiting Professor.

JOHN G. DAVIES

NOMINEE, U.S. DISTRICT JUDGE, CENTRAL DISTRICT OF CALIFORNIA

Birth: May 17, 1929. Sydney, N.S.W., Australia.

Naturalized: August 5, 1960. Los Angeles, California.

Legal Residence: California.

Marital Status: Married. Margery Moon Follinger Davies, 2 children.

Education: 1949-1953—University of Michigan, B.A. degree. 1954-1955—University of Michigan, School of Law. 1956-1957—University of Sydney, Faculty of Law. 1957-1959—U.C.L.A., School of Law, LL.B. degree.

Bar: 1961—California.

Experience: 1959-1960—Gerard F. Baker, Esq., Law Clerk. 1959-1960—Farmers Insurance Group, Claims Adjuster. 1960-1972—Hagenbaugh, Murphy & Davies, Law Clerk (1960-1961), Associate (1961-1967), Partner (1967-1972). 1972-present—Rosenfeld, Meyer & Susman, Associate (1972-1973), Partner (1974-present).

CONFIRMATION HEARING ON EDWIN M. KOSIK

WEDNESDAY, JUNE 4, 1986

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 2:07 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Arlen Specter (acting chairman) presiding.

Also present: Senators Denton and Simon.

Staff present: Duke Short, chief investigator.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator Specter. Good afternoon, ladies and gentlemen. This session of the Committee on the Judiciary will come to order.

The Chairman, Senator Thurmond, called this morning and advised of his obligations elsewhere and requested that I preside this afternoon. It is a great pleasure to do so, as this hearing is to consider the nomination of the Honorable Edwin M. Kosik, of the Court of Common Pleas of Lackawanna County, PA.

I appear here today in the dual role as the presiding Senator at this Judiciary Committee hearing—customarily, I sit next to Senator Heinz. But you, Judge Kosik, are being flanked by two very distinguished Pennsylvania legislators, Senator Heinz and Congressman McDade, so I will forgo the customary approach of making an introductory statement.

I have your résumé before me, and it is an outstanding and distinguished résumé of your educational background, military service, honors, community activities, service on the bench, president judge of the court of common pleas.

Before proceeding further, I will yield at this time to my distinguished colleague from Alabama, Senator Denton, to see if he has an opening statement.

Senator Denton. No, Mr. Chairman; thank you. I am just going to listen in on the hearing.

Senator Specter. All right. Thank you very much, Senator Denton.

Now, I would like to turn to my distinguished colleague from Illinois, Senator Simon.

Senator Simon. Thank you. We are very pleased to have the nominee here. I notice the American Bar Association gaves you a well-qualified rating, which makes you above average here, and is a tribute to the two Senators from Pennsylvania.

It is good to see my former House colleague, Joe McDade. I knew him when he did not have all that white hair and that distinguished look.

Mr. McDade. I think you are right. Thank you.

Senator Specter. Thank you very much, Senator Simon.

Now, I turn to the distinguished Senator from Pennsylvania, Senator Heinz.

STATEMENT OF HON. JOHN HEINZ, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator Heinz. Well, Mr. Chairman, I feel a little embarrassed to be introducing Judge Kosik ahead of Joe McDade, who practically grew up with Ed Kosik, but nonetheless I will take this opportunity to do so because Judge Kosik's nomination is a product of a process of merit selection that I think you and I are both very proud of.

Senator Simon mentioned that Judge Kosik is considered very well qualified by the Bar Association, and indeed he is. He is also considered by his constituents in the Scranton area to be one of the finest people from Lackawanna County and northeastern Pennsylvania.

So it is a pleasure to be able to introduce him, at least in the context of this committee hearing, to you, Mr. Chairman. People wondering about the impartiality of the chairman need have no fear that just because you are from Pennsylvania that you will give Judge Kosik any favoritism.

I know, Ed, you are not worried about that at all, either.

I must say all of us are extremely proud for the opportunity to say a few chosen words, carefully considered, on behalf of the nominee of the president for the U.S. District Court for the Middle District of Pennsylvania.

I am delighted, Mr. Chairman, to lend my unqualified support to this nomination and to his confirmation by your committee and by the Senate. He has had an outstanding career and it is one that has been marked by a very strong personal commitment to the principles of justice and freedom, and those are the principles that I think we believe have made our Nation a very great one indeed.

His background is distinguished. He was awarded battlefield commissions in World War II. He became one of the youngest company commanders in the European theater of operations.

He served as a member of the Court of Common Pleas of Lackawanna County for 17 years, most recently as president judge, and he has handed down many significant decisions on a variety of civil and criminal cases.

A former president of the county bar association, Judge Kosik has really earned the admiration and respect of his peers. I might say as well that he is distinguished by an exceptional level of legal scholarship, by a rare facility for applying abstract legal opinions to real-life situations.

I have no reservation whatsoever about Judge Kosik's knowledge of the law; it is outstanding. His legal opinions are a matter of record. His experience as an assistant U.S. attorney and as an attorney in private practice and as a judge frankly constitute the very best and highest qualifications that we could ever expect for someone who seeks the responsibilities of a Federal judge, in this case for the middle district.

So, Mr. Chairman, I am pleased to support for confirmation by your committee and by the Senate somebody who really has served well the cause of justice with great dignity and distinction, and that is Ed Kosik.

Senator SPECTER. Thank you very much, Senator Heinz.

I would like now to turn to the distinguished Congressman McDade. As Senator Heinz has referred to, Judge Kosik did emerge from the merit selection process which Senator Heinz and I have, but Congressman McDade was consulted about the appointment and had a great many kind, flattering and accurate things to say about Judge Kosik before Judge Kosik's name was submitted to the President for consideration, so that Congressman McDade was very deeply involved in the entire appointing process.

It is a pleasure to have you here, Congressman McDade, and we look forward to hearing your comments.

STATEMENT OF THE HON. JOSEPH McDADE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. McDADE. Thank you very much, Mr. Chairman, Senator Denton, and my colleague, Jack Heinz. I would first like to compliment both of you on the merit selection process that you have instituted and say that if anyone wishes to question it, you might point to the nominee that you have in front of the committee today as exhibit A about why that program brings the best and the brightest to the Federal judiciary.

I would appreciate it, Mr. Chairman, if I might file a statement which I have written for part of the record.

Senator SPECTER. Without objection, it shall be made a part of the record.

Mr. McDADE. I will just share with you very, very briefly just a few thoughts about the man who is in front of you today for confirmation.

I have known him virtually all of my adult life. I was reflecting back in my memory today, and I believe the first time that we met was when I had graduated from law school and was working for the U.S. district judge of the Court of Common Pleas in Scranton.

My colleague, Judge Kosik, was at that time a part of the U.S. attorney's office in the city. Obviously, with an awful lot of professional duties back and forth, we became very, very close friends.

I have known him not only in that capacity. It has been my privilege to know him as a friend, and that is really the reason I am here, because in a community such as mine, 100,000 people in the city, a quarter of a million in the county——

In that community, one got to know everybody not just as a professional, but the real person. Eddie Kosik has been a great credit to our community. Like his father before him, like his sons and daughters, two of whom, by the way, are in the room today and in the legal profession, and with his marvelous wife, Lois, who has always been a pillar of our community, Judge Kosik brings to you the best in integrity, and I have absolutely no hesitation in saying that.

If we were in a court of law, familiar with the qualifications of an expert witness, I would stipulate to you that I would qualify, knowing him as long as I do and being able to say without equivocation, his integrity is and will remain unquestioned.

He has all of the intellectual requirements, and more, to do this magnificent job that he is about to be entrusted with superbly.

So I want the committee to know that Judge Ed Kosik and his wife, Lois, make the community and the world a better place by what they do day by day, minute by minute, hour by hour.

I would offer my unreserved praise and countenance of the nomination process on behalf of a distinguished fellow American, Judge Edwin Kosik.

Thank you, Mr. Chairman.

[The prepared statement follows.]

PREPARED STATEMENT OF CONGRESSMAN JOSEPH M. MCDADE

Thank you, Mr. Chairman. I have the pleasant task today of testifying in support of the President's nomination of one of my constituents, Judge Edwin M. Kosik, for the federal judgeship of the Middle District of Pennsylvania.

I have known Judge Kosik for over 25 years and am familiar with his credentials for this important post. For my entire life I've known the name Kosik. This is because Mr. Kosik's father, the late Mike Kosik, was the distinguished labor leader in my part of Pennsylvania and the country. The judges father was president of district 1, United Mine Workers of America, which then consisted of 50,000 workers. Judge Kosik has distinguished himself in all of his undertakings. He is a credit to the legal profession and has been an outstanding citizen of Lackawanna County in my Congressional District.

Judge Kosik's qualifications speak for themselves, but I would like to take a moment to highlight some of his achievements. He is a graduate of Valley Forge Military Academy, served three years in the U.S. Army and was part of the invasion force in the south of France during World War II. Judge Kosik received two battlefield promotions—First Lieutenant then Captain. His leadership capabilities were evident in the military when he was made Company Commander of an armored infantry force consisting of 330 enlisted men and officers.

After the war, Judge Kosik entered the accelerated educational program with other discharged veterans. He graduated from the Dickinson School of Law, and joined the staff in 1953 of the United States Attorney. During his five years as Assistant U.S. Attorney, he tried numerous major criminal civil cases at the trial and appellate levels.

Judge Kosik went into private practice for a number of years until Governor William Scranton appointed him Chairman of the Pennsylvania Workmen's Compensation Board in 1964. He held that position until his appointment in 1969 as President Judge of the Court of Common Pleas in Lackawanna County, a position he currently holds.

As impressive as his resume is, it doesn't convey the respect Edwin Kosik has earned in the community, the depth of his legal understanding and his commitment to his profession. On a personal note, Judge Kosik is the father of three children, two of whom are in the legal profession.

I am very pleased with Judge Kosik's nomination, and I can attest to the fact that he would make an excellent federal judge for the Middle District of Pennsylvania. I enthusiastically urge the approval of his nomination.

Senator SPECTER. Thank you very much, Congressman McDade.

Before proceeding further, we have asked for a Senate photographer to join us and as he has a schedule as busy as ours we will break for a moment. Senator Heinz, would you remain while we take a picture? We will then proceed with the balance of the hearing.

[Pause.]

Senator SPECTER. Judge Kosik, Senator Heinz had alluded at the start to having a favorable presiding Senator here today. That is accurate. I have noted your record, noted your background of accomplishments

Senator Thurmond, the chairman of this committee, as a matter of practice, asks the nominee to introduce his family, and I would ask that you do that at this time, if you would, please.

Judge KOSIK. I appreciate that opportunity.

My wife, Lois, and we have two daughters, Carol, sitting next to my wife, who happens to be an editor analyst with McGraw-Hill in New Jersey; my daughter, Barbara, who is an assistant U.S. attorney; and my son, Michael, who is a tort litigator with a law firm in the city of Harrisburg, PA.

I would like to also introduce Joe Whittaker, who is a member of the U.S. Secret Service, and is here as a friend as well as an observer.

Senator SPECTER. Well, may the record show that Judge Kosik has a beautiful family and they are standing now, and we appreciate your introducing them, Judge.

I have noted your background, your roots in Lackawanna County, having been born in Dupont, PA, on May 5, 1925; your outstanding academic career at Wilkes College and the Dickinson School of Law; your service as an assistant U.S. attorney; your work with the Commonwealth of Pennsylvania in the department of labor and industry; and your tenure as a common pleas judge from 1969 to the present time; your military service, starting in World War II with the rank of corporal, moving up to captain, commanding officer in the infantry; and your continued participation in the Army Reserve as a colonel; and a long list of honors and awards and activities in bar associations and community activities.

Your full résumé will be made a part of the record.

As Senator Simon has already noted, you have the high rating of well qualified by the American Bar Association.

Before proceeding to the questions, if you would rise, Judge Kosik, in accordance with our practice I will swear you in.

Do you solemnly swear that the answers and the testimony that you shall give will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge KOSIK. So help me God.

Senator SPECTER. Thank you, Judge Kosik. You may be seated.

Before proceeding to the questions which have been prepared for our asking you, Judge Kosik, we would be pleased to hear any opening statement that you would care to make at this time.

TESTIMONY OF EDWIN M. KOSIK, OF PENNSYLVANIA, TO BE U.S. DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

Judge KOSIK. No, sir, I have no opening statement.

Senator SPECTER. Judge Kosik, at the present time, you are a judge for the Court of Common Pleas, 45th Judicial District, Commonwealth of Pennsylvania, and this is a court of general jurisdiction.

Do you foresee any difficulty in the transition from your present position to that of a U.S. district judge?

Judge **Kosik**. No, sir; because I think that the U.S. district court basically is the court of general jurisdiction on the United States side, so the duties would be the same, trial work, primarily.

Senator **Specter**. In reviewing your file, Judge Kosik, it has been noted that during the last 5 years you have directed a complete overhaul of your court system of judicial administration.

Would you please advise the committee what steps you took to initiate this action and what have been the results of this effort?

Judge **Kosik**. Well, we eliminated the deficiencies found in most trial calendars throughout this country, and that is in having members of the bar influence trial calendars and having judges influence trial calendars.

We took that away from both the lawyers as well as the judges and vested that and delegated that authority to a very competent court administrator to ensure the certainty that cases would be listed and to ensure the certainty that those cases would be tried.

Senator **Specter**. Judge Kosik, Senator Thurmond has asked that you give the committee your views on penalties that should be imposed on repeat drug offenders, and I would ask you to do so to the extent that you feel you can consistent with the individualization of sentencing which is obviously implicit in the question.

Judge **Kosik**. I think, and it can only happen through legislation, that a repeat drug offender should be dealt with more severely than a repeat offender for other crimes because I think while there are victims to all crimes, in the case of the utilization of drugs they seem to be completely invading too many branches, facets, of our society.

And I think that I would favor stricter enforcement of the law through penalties. We have our hands pretty much tied with sentencing guidelines now in our Commonwealth, and I know that eventually those guidelines are going to be adopted on the Federal side as well, so that legislation would be required to correct that.

Senator **Specter**. Judge Kosik, this is a standard question: How does a responsible judge go about the process of interpreting such seemingly open-ended constitutional provisions as the due process or equal protection clauses without simply imparting his own values to these provisions?

Judge **Kosik**. In many cases, whether you be a judge or serving in another representative capacity, we all have our personal views in many areas. But when you are charged with the discharge of responsibility as a judge, I think first you have to be aware of what those frailties might be, if I can call them frailties, and they would be frailties if there was a threat to a personal opinion affecting one's ability to discharge a responsibility. Recognize what those things are.

You cannot completely eliminate them, but by recognizing them, putting them aside, and giving significance to the fact that one has those personal views that might conflict, I think you can do justice in the discharge of that responsibility.

Senator **Specter**. In response to a portion of the committee questionnaire concerning judicial activism, you stated, in part, "Judicial activism erodes the legislative process because it tends to relieve legislators from accountability for societal requirements and constitutional propriety."

Where, in your view, Judge Kosik, does a conscientious judge draw the line between judicial decisionmaking and legislative decisionmaking, and what are the criteria that you would consider in resolving whether or not a decision was the type that should be made by a judge as opposed to an elected legislative body?

Judge KOSIK. Well, I think, again, it has a tie-in to my last response. We all have our personal views of legislation, as we do on other issues. But it seems to me that when a judge is confronted with interpreting legislation, it should not be his responsibility, whether he agrees or disagrees with that legislation, in one case to either enlarge it or in another case to constrict it, depending on his views, simply because they are his views.

I think that courts that tend to be too active view a piece of legislation, try to feel the temperament or thinking of people with respect to that legislation, and then assume a legislative role in interpreting it according to what their view of the public acceptance might be. I do not think that is the function of the judge

Again, that legislation, if it is to be amended, ought to be amended by the legislature and not by the court.

Senator SPECTER. Thank you, Judge Kosik. Those are the questions which the chairman has asked that I propound to you at this time.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

Unfortunately, I have another meeting I am supposed to attend. I have observed, however, although Senator Specter and Senator Heinz, are to be commended that we have too few nominees who are experienced judges. I hope 99 percent of them turn out to be very fine judges, but the fact is we cannot be sure.

In your case, Judge Kosik, we know whether or not you are going to be a good judge because we have the record. That is a refreshing change.

I am not suggesting that we nominate only those who have served on the State courts, but I think in general it is a wise practice. In that connection, one of the things I noticed in glancing through the information we have from you—is that you have guaranteed a trial within 100 days after counsels' certification that they are prepared.

Do you think that will work at the Federal level, also?

Judge KOSIK. Yes, sir; I think it does and should work just as easily on the Federal level. We have a general calendar at our level, but at the Federal level they have the individual calendar where each judge has the individual responsibility for setting his own calendar of work.

The same ambition, if it is applied to an individual calendar, can achieve the same end that is applied to a general calendar. Yes, sir; I firmly believe in that.

Senator SIMON. I thank you.

I have no further questions, Mr. Chairman. I congratulate you, and I would just add I wish I felt as comfortable about every nominee who comes before us as I do about you, Judge. I never met you before, but on the basis of your record and what you say, I think you are going to be a superlative member of the bench.

Judge **Kosik**. That is very kind of you, Senator, and I appreciate it, and my family, I am sure, appreciates it

Senator **Specter**. Thank you very much, Senator Simon.

Judge Kosik, just keep your seat. We are now going to call on the Honorable James McNulty, former mayor of Scranton, PA.

Mayor, will you stand to be sworn, please? Do you swear that the testimony you shall give in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **McNulty**. So help me God.

TESTIMONY OF JAMES BARRETT McNULTY, FORMER MAYOR, SCRANTON, PA

Mr. **McNulty**. I may want to amend my remarks after that oath—I am only kidding.

I want to thank you, Mr. Chairman, and the members of the committee in allowing me to come and testify today on behalf of Judge Kosik.

I have a formal statement. I will give it to you to enter into the record.

Senator **Specter**. Without objection, it shall be admitted into the record in full.

[Prepared statement follows:]

Prepared Statement of Hon. James Barrett McNulty

Mr. Chairman and Members of the Committee, as a former Democratic mayor I come here to second the nomination of a qualified nominee for judge in the middle district of Pennsyvlania—Judge Edwin Kosik.

I do so because to remain silent since this nominee is not of my party or is not nominated by a president from my party would be to deny the worthiness of this jurist as well as his unique qualifications for elevation to the bench for the 32 counties of northeastern and central Pennsylvania.

Judge Kosik is the son of a union organizer who helped lift the value of the toil of his fellow mine workers literally from the underground up.

Judge Kosik as a prominent member of the Polish National Catholic Church knows the need for the protection of religious and ethnic diversity and tolerance.

Judge Kosik was a worker for the Republican Party in Scranton and Lackawanna County long before it was popular and prior to his appointment to the Common Pleas Court and his retention by the electorate.

I was not requested to come here today to recommend Judge Kosik. I came here because this man who has been nominated by the President of the United States and will assume his office with the concurrence of the United States Senate is best recommended not by me but by the work product of his life . . . his love of God, country and family.

Judge Kosik's work ethic has taken him from a blue collar family to a white collar lawyer to a non-collar judge—a judge of independence, integrity and courage. His decisions, demeanor and dedication give testimony enough to seek your concurrence.

Mr. **McNulty**. I come here today as a former Democratic mayor of the city of Scranton, and I emphasize the word "Democratic," and I come here today because I do not believe it is right for me to remain silent just because this nominee happens to be a member of the other party or nominated by a President of the other party. I think that would do a disservice to the worthiness of the jurist that you are considering.

Senator **Specter**. Do not forget the Senators of the other party.

Mr. **McNulty**. I will not forget the Senators. I was going to get to the Senators, Senator, but that is all right.

I realize that Judge Kosik's nomination is a result of the process that you and Senator Heinz initiated, as well as the concurrence of Congressman McDade. But I do also want to point out that many of the things that you know about Judge Kosik may be matters of record, but what I know of Judge Kosik comes from the experience of knowing him probably for the last 26 years that I have been involved in the political life of the city of Scranton and Lackawanna County.

I know him to be the son of a union organizer who literally helped mine workers lift the value of their toil to the point where they took it from literally the underground up. I know him to be a judge who is fair. I know him to be a prominent member of the Polish National Catholic Church, and because he is, he is very familiar with the need for the protection and the tolerance of ethnic and religious diversity in this nation.

I also know Judge Kosik to be a very diligent—as you do, Mr. Chairman, a diligent worker in the past for the Republican Party prior to his assuming the bench. I say parenthetically that perhaps if he had not been so diligent and taught them so well, I might not be a former mayor speaking to you today.

But even though I am, I say to you quite honestly and candidly and under oath that I do believe that Judge Edwin Kosik is not only qualified for this bench because he is the son of a blue-collar family who literally took himself to a write-collar profession as a lawyer and then became a no-collar judge who is independent, with integrity and with honesty, and whose decisions have been dedicated and whose decisions have been courageous as a member of the common pleas court, and I recommend him highly not only to the majority members of the committee, but especially to the minority members of the committee, one of whom happens to be a former resident of the city of Scranton.

Thank you.

Senator SPECTER. Well, thank you very much, Mayor McNulty. You are referring, of course, to Senator Biden, and I am sure that Senator Biden will very much appreciate your comments.

Judge Kosik, we have endeavored to speed up the process to the maximum extent we could, and I want to take this opportunity to thank Senator Thurmond, the chairman of this committee, and Duke Short, who is the administrator of this facet of the activities, because they have advanced your papers nomination out of sequence.

You would have been heard at some later date, but at my request and the request of Senator Heinz, the processing was expedited. There is customarily a rule that the nomination may not be heard at the executive session until at least 1 week following.

I have already discussed it with Mr. Short and we will see if we can get unanimous consent to put you on the calendar for tomorrow. I am encouraged to do so by what Senator Simon has said. Senator Simon is the Democratic representative who takes a little closer look at judicial nominees on behalf of his party.

So if it is possible to do that, I, for one, would like to see you assume your new duties at the earliest possible time because it is always good to move ahead with the work of the court.

These things necessarily take time, but to the extent that we can expedite and cut the time down, we are very anxious to do so.

Judge Kosik. Well, I appreciate that, and as I told Mr. Short when I came in earlier, the security people in this building said you are meeting with a real nice guy, and now I know why—Duke Short.

Senator SPECTER. Well, they are correct.

That concludes the hearing. Thank you all very much.

Judge KOSIK. Thank you very much.

[Whereupon, at 2:34 p.m., the committee was adjourned.]

BIOGRAPHY

EDWIN M. KOSIK

NOMINEE, U.S. DISTRICT JUDGE, MIDDLE DISTRICT OF PENNSYLVANIA

Birth: May 5, 1925. Dupont, Pennsylvania.

Legal Residence: Pennsylvania.

Maritial Status: Married. Lois Eileen Bistline Kosik, 3 children.

Education: 1946-1949—Wilkes College, B.A. degree. 1949-1951—Dickinson School of Law, LL.B. degree.

Bar: 1952—Pennsylvania.

Military Service: 1943-1946—United States Army, Corporal. 1946-1975—United States Army Reserve, Colonel, retired.

Experience: 1951-1953—Needle, Needle and Needle. 1958-1969—Associate. 1953-1958—Assistant U.S. Attorney, Middle District of Pennsylvania. 1964-1969—Pennsylvania Department of Labor and Industry, Workmen's Compensation Board, Chairman. 1969-present—Judge, 45th Judicial District, Commonwealth of Pennsylvania, President Judge (1980—present).

CONFIRMATION HEARINGS ON: WILLIAM W. WILKINS, JR., KAREN LeCRAFT HENDERSON, D. LOWELL JENSEN, WILLIAM D. STIEHL, AND JOHN E. CONWAY

WEDNESDAY, JUNE 11, 1986

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 2:05 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators McConnell, Metzenbaum, and Simon.

Staff present: Duke Short, chief investigator, and Reginald C. Govan, minority counsel/investigator.

OPENING STATEMENT OF SENATOR MITCH McCONNELL

Senator McConnell [presiding]. The hearing will come to order. The chairman will be here shortly. I thought I would get it started because I see we have a number of Senators who came over to speak on behalf of some of the President's nominees.

I know that Senator Domenici and Senator Wilson both have an urgent need to get back to the floor, so why do we not have Senator Domenici come forward on behalf of Mr. Conway and make his remarks if he would like to at this time.

Senator? I see Senator Bingaman here also.

STATEMENT OF A PANEL CONSISTING OF HON. PETE V. DOMENICI, A U.S. SENATOR FROM THE STATE OF NEW MEXICO; HON. JEFF BINGAMAN, A U.S. SENATOR FROM THE STATE OF NEW MEXICO; HON. JOE SKEEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW MEXICO; AND MANUEL LUJAN, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW MEXICO

Senator Domenici. Mr. Chairman, I wonder if we might have our delegation come forward. There are four of us and the nominee.

Senator McConnell. That will be fine, Senator. Come on forward and Mr. Conway come forward as well.

Senator Domenici, do you want to lead off?

Senator Domenici. Yes. Thank you, Mr. Chairman.

Let me first introduce our Congressmen to you, Mr. Chairman. Congressman Manual Lujan, Congressman Joe Skeen, and I think you know both of us Senators. I would like to introduce to you our

President's nominee for U.S. District Court for the District of New Mexico, John Conway. He is here accompanied by his wife, Karen. Karen, would you stand up, please.

Mr. Chairman, we are delighted to be here. We know how busy you are and how busy all the members of this committee are, so we do not want to take a lot of time. We feel rather confident that the President made the right decision in nominating John Conway to be our new district court Judge.

As you might know, we just had one of our Federal district judges, Bobby Ray Baldock, confirmed to become a circuit court judge. We are very proud of him, and now John Conway is here to fill the vacancy created by that change in our judiciary in New Mexico.

By way of background, I am aware that you have all of the background on the nominee, perhaps even in more detail than we do. Nonetheless, I would like to say that there is no doubt in my mind that the President nominated the right person and a very competent person and a well-rounded person.

Not only has he been an excellent lawyer, he has served in the State of New Mexico with distinction. He has taken time out to serve in the State legislature and he was a leader there. He has taken time out for civic affairs, and he was a leader there. He has taken time out for bar activities, and he was a leader there. Not only was he a leader but he also served on a committee that screened nominees for the State judiciary and on the disciplinary committee of the New Mexico State Bar.

In addition, I might say about 5 years ago we had a judicial review committee in New Mexico to pass judgment on nominees. We have not had that committee review nominees for quite some time, but we did not have to in this case because the last time we had a vacancy, John Conway was approved by this bipartisan community and bar association committee. So we were one up on that, we did not have to worry about his competency.

I believe he has been recommended by the appropriate bar associations, both of our State and nationally. We are delighted to have bipartisan congressional support in his behalf. I urge that the committee expedite its work on the nomination. I am sure the full Senate will there expedite his confirmation as well.

We need this vacancy filled. It has been vacant for a while, Mr. Chairman.

Thank you very much for having us. I certainly would hope that you would grant a little bit of time to the members of the delegation to speak their words before you inquire of the nominee.

Thank you.

Senator McCONNELL. Thank you, Senator Domenici.

Senator Bingaman.

Senator BINGAMAN. Thank you, Mr. Chairman. I will just put a statement in the record, if I can, in support of the nominee. I would also join Pete in indicating that John Conway is eminently respected by the bar in New Mexico. He also has the great benefit of having served with distinction in our State legislature, and I think that gives him an insight into the workings of another branch of government which is useful. I think he is exactly the kind of person that I, for one, would very much like to see proposed by the President for a position of this importance and I wholeheartedly support his nomination.

Thank you.

[The prepared statement of Senator Bingaman follows:]

Prepared Statement of Senator Jeff Bingaman

Mr. Chairman, I am pleased to join my distinguished colleague, Senator Pete Domenici, in support of the nomination of John E. Conway for the office of United States District Judge for the District of New Mexico.

I have known John for at least fifteen years, both in his capacity as a practicing lawyer in the State of New Mexico and as a former State senator.

Most recently, John has been practicing law with the Albuquerque office of Montgomery and Andrews, a firm with three offices—in Albuquerque, Santa Fe and Los Alamos. John opened the Albuquerque office in 1980 following his retirement from the New Mexico State Senate. As a State senator he represented the citizens of Otero and Lincoln Counties from 1970 until 1980, serving as the Republican minority leader for eight of his ten years in office. His committee assignments included the judiciary, corporation, and education committees.

Prior to his legal practice in Albuquerque, John practiced law as a partner in Alamogordo with the firm of Durrett, Conway and Jordon. He also served as city attorney of Alamogordo for six years during which time he handled all of the city's legal affairs.

In addition to his practice, John has been active in the New Mexico State Bar Association. He was appointed to the disciplinary board of the supreme court of New Mexico in 1977 and remains a member to this date. He has also served as a member of the medical-legal committee and the New Mexico State Bar Judicial Selection Committee.

Despite his busy professional schedule, John also served on the Governor's organized crime prevention commission and is its current chairman. He also was appointed to the National Commissioners on Uniform State Laws in 1978 and served on that Commission until 1980.

John brings with him extensive trial and litigation experience for the office of Federal district court judge. His background and experience make him uniquely well qualified for this position. It is a personal pleasure for me to endorse his nomination before this committee today.

Senator McConnell. Thank you, Senator.

Congressman Lujuan.

Mr. Lujan. Thank you very much, Mr. Chairman. I will not take very much time. We have got a vote coming up. We just got our beeper.

We all know, all the members of the delegation know John very well. As a matter of fact, we are all very proud to be able to recommend him to this position, and so I would hope that the committee would give him their wholehearted support because he deserves it.

I would like to ask permission to insert a statement.

Senator McConnell. Your statement will be made a part of the record.

[The prepared statement of Mr. Lujan follows:]

Prepared Statement of Hon. Manuel Lujan, Jr.

Mr. Chairman, I am indeed pleased to endorse the nomination of John Conway as judge for the U.S. District Court for New Mexico. I have known John and his family for many years and have the utmost respect and admiration for his integrity and dedication to the highest ideals of public service.

John served for eight years as the distinguished Minority Leader of the New Mexico State Senate. During that time, he exercised his usual diligence to ensure that the judicial system in New Mexico maintained the highest standards of fairness and impartiality. In addition, quality education has never had a stronger advocate in New Mexico than John, who distinguished himself both at the U.S. Naval Academy and at Washington University Law School from which he graduated at the top of his class.

With broad legal experience, John is indeed well suited for this position on the Court. He has served as a city solicitor and presently is a director in a highly respected Albuquerque law firm. In a few words, John has contributed immensely to making the State a better place in which to live.

I know that John will do once again an outstanding job in the discharge of the solemn responsibilities of the Court. He is a keen student of the law and possesses a healthy respect for the role of the judiciary in a society premised on the rule of the law.

Mr. Chairman, I hope you will give John Conway all due consideration and grant him prompt confirmation.

Thank you.

Senator McCONNELL. Congressman Skeen.

Mr. SKEEN. Thank you very much, Mr. Chairman. We do appreciate the respect and the consideration that you give us over on the House side. I am here, too, in a very happy position supporting the nomination and recommending the confirmation of Mr. John Conway. We are great friends. We have been friends for a long time, over 20 years, and I have the greatest respect for this man's ability and have no reservations whatsoever in recommending him for this nomination to the Federal bench.

As a matter of fact, Mr. Conway has served as my legal counsel. He has to be competent because being a Member of Congress, I am still walking around free, and I think that I had very good advice.

In addition to that, he took my place in the New Mexico State Senate after I left to run for another office. He rose to a leadership position in that body. This is a culmination of a longtime wish and desire on both of our parts and I appreciate very much the consideration that has been given him and recommend him wholeheartedly.

Thank you very much.

Senator McCONNELL. I want to thank all of you.

Senator Domenici, did you want to add something?

Senator DOMENICI. No; I just wanted to tell the chairman that I believe all of us have to depart. I think that is customary. I do want the nominee to understand that we are not abandoning him. We are going to do our thing. It is now up to this committee, the distinguished members who are here. I want to thank them for their consideration and hope they will expedite this nomination.

Senator Hollings, are you a member of the committee?

Senator HOLLINGS. No; I am not.

Senator DOMENICI. That is another reason for us hurrying.

Thank you.

[The prepared statement of Senator Domenici follows:]

PREPARED STATEMENT OF SENATOR PETE V. DOMENICI

Mr. Chairman, thank you for inviting me before you today to introduce John E. Conway to the Committee. Late last year, this Committee approved the nomination of Judge Bobby R. Baldock to the United States Court of Appeals for the Tenth Circuit. I am pleased that President Reagan has nominated Mr. Conway to succeed Judge Baldock on the United States District Court for the District of New Mexico.

It is fitting that Mr. Conway should be nominated to replace Judge Baldock on the District Court, not only because both are outstanding members of the legal profession, but also because Mr. Conway was selected by the New Mexico Federal Judicial Selection Committee as a finalist for the District Court seat to which Judge Baldock eventually was appointed in 1983. So it is now Mr. Conway's turn to come before this Committee. I can assure you that he is very grateful to have the opportunity to present himself to you at long last.

When the vacancy on the District Court occurred, John Conway immediately came to mind as the candidate to fill it. He demonstrates the intelligence, high character, temperament, and diligence which are hallmarks of American judges. His qualifications and experience make him an excellent candidate for the federal judiciary.

Let me share some of Mr. Conway's qualifications with you. John Conway was born in Joplin, Missouri in 1934. He attended the United States Naval Academy from 1952 to 1956, when he received his Bachelor of Science degree. After serving his country as a First Lieutenant in the United States Air Force from 1956-60, Mr. Conway attended Washburn University Law School. He received his law degree magna cum laude and was ranked first in his class. He served as both Editor-in-Chief of the Washburn University Law Journal and President of the Student Bar Association.

After graduating from law school, Mr. Conway practiced law with Matias A. Zamora in Santa Fe. In 1964, he joined the Wilkinson & Durrett law firm in Alamogordo. He stayed with this firm, which eventually became Durrett, Conway & Jordan, until 1980. He also served as City Attorney for the City of Alamogordo from 1966-72. Mr. Conway currently is a partner with the Albuquerque office of the Montgomery & Andrews law firm.

Mr. Conway has been admitted to practice before the courts of New Mexico, both State and Federal, the United States Claims Court, the United States Court of Appeals for the Tenth Circuit, and the Supreme Court of the United States.

It is noteworthy, since the District Court is the federal trial court, that Mr. Conway's practice consists predominantly of litigation. He, therefore, will bring with him to the District Court the experience of many years of trial practice and the knowledge of the rules of evidence and procedure which are so vital to the proper functioning of our courts. This wealth of experience is reflected in the fact that the American Bar Association committee which evaluated Mr. Conway's qualifications for a District Court judgeship unanimously voted to give Mr. Conway a rating of "Well Qualified."

Mr. Conway has a long history of service to the State of New Mexico. He served as State Senator from Otero and Lincoln Counties from 1970-80. He was chosen by his fellow Republican Senators to be Minority Leader of the State Senate from 1972-80. He has served as Chairman of the New Mexico Judicial Council, the Governor's Organized Crime Prevention Commission, and the Disciplinary Board of the New Mexico Supreme Court. He also has served on the New Mexico State Bar Judicial Selection Committee, the New Mexico Medical-Legal Committee (which is New Mexico's medical malpractice review panel), and the National Commissioners on Uniform State Laws.

He has been involved with a large number of organizations serving his profession, including the American Bar Association, the New Mexico Bar Association, the Albuquerque Lawyers Club, the Albuquerque Bar Association, and the Otero County Bar Association (of which he served as President).

Mr. Conway is married to Karen Howard Conway. He has three sons, John, Matthew, and Christopher, and three step-children, Rebecca, Geoffrey, and Strom Peterson.

Of course, this is just a brief portrait of Mr. Conway, but I'm sure that you will agree that you have before you a man of extraordinary achievement. In sum, I would say that John Conway is well suited by training, experience, and temperament to serve on the federal judiciary. I look forward to John Conway being able to bring his unique talents and long history of service to the United States District Court. I hope that this Committee will act favorably on this nomination.

Senator McConnell. Thank you all for coming.

Mr. Conway, we will call you shortly.

Senator Wilson had requested to come next. Is he still here?

OK, we will hear Senator Hollings, in support of Mr. Jensen.

We are going to have to recess momentarily because I am going to have to depart. The chairman should be here any minute, so if you all will just stay where you are, we will continue shortly.

[Short recess.]

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The committee will come to order.

I have been unavoidably detained. I am very sorry. I could not be here sooner. I just could not get away.

I am very pleased today to introduce to the Senate Judiciary Committee Mrs. Karen L. Henderson. Mrs. Henderson was born in Oberlin, OH. She graduated in 1966 from Duke University, where she received a bachelor of arts degree. Mrs. Henderson entered the University of North Carolina School of Law and received her juris doctorate degree in 1969. From 1969 to 1971, she was a practicing attorney in North Carolina. In 1973 she passed the South Carolina bar examination. From 1973 to 1982, Mrs. Henderson served with distinction with the Office of the Attorney General for the State of South Carolina. In this capacity, she served as Assistant Attorney General from 1973 to 1978. From 1978 to 1982, she served as Senior Assistant Attorney General and Director of the Special Litigation Section. In 1982, she served as the first woman Deputy Attorney General and Director of the Criminal Division. In 1983, Mrs. Henderson joined the law firm of Sinkler, Gibbs & Simons—I am not sure whether he is related to you or not.

Senator SIMON. Absolutely.

The CHAIRMAN. Where she has continued to prove herself as a very able attorney.

Mrs. Henderson, who will be the first woman appointed to the Federal court in South Carolina, brings to the bench impressive qualifications and a legal background that is well suited to the Federal district court. Her areas of specialization have included constitutional law as well as criminal and administrative law.

She is a woman of ability, integrity, and independence. Mrs. Henderson is a dedicated and trustworthy individual whose commitment to justice for all is exemplified through the courage of her convictions. Mrs. Henderson's outstanding record speaks for itself. She has the experience and judicial temperament to become an outstanding jurist for the district court.

It was with considerable pride that I recommended Mrs. Henderson to President Reagan for this very important position, and it is with an equal amount of pride that I present her to the committee today.

Now, as to Judge Wilkins, it gives me great pleasure to introduce to the committee Judge William W. Wilkins, Jr., President Reagan's nominee to be the judge on the fourth circuit court of appeals. Judge Wilkins is no stranger to the committee, as he presently serves as U.S. district judge for South Carolina, as well as Chairman of the U.S. Sentencing Commission. Both of these positions require approval of this committee as well as the full Senate.

Judge Wilkins is a native of Greenville, SC, a graduate of Davidson College, in North Carolina, and the University of South Carolina School of Law. He was editor in chief of the South Carolina Law Review, captain of the South Carolina National Moot Court Team, and a member of the Wig and Robe.

During his senior year in law school, Judge Wilkins was selected by the faculty as the outstanding graduate of the year. After law school, Judge Wilkins served for 2 years in the U.S. Army. Upon his discharge from active duty, he worked as a law clerk to former Chief Judge Clement F. Haynsworth, Jr., of the U.S. Court of Appeals for the Fourth Circuit.

After completing his work with Judge Haynsworth, Judge Wilkins served as the legislative assistant for the Antitrust and Monopoly Subcommittee of the Senate Judiciary Committee. In January 1971, he returned to Greenville and entered the private practice of law. In January 1975, Judge Wilkins was sworn in as solicitor for the 13th judicial circuit. This meant that he was the State district attorney for a large judicial circuit. He was reelected to that position in 1978. Judge Wilkins was the first solicitor elected in South Carolina on the Republican ticket since reconstruction.

He has developed a reputation as a fearless and vigorous prosecuting attorney, yet one who has always treated everyone fairly and equally. Judge Wilkins was appointed U.S. District Judge for the District of South Carolina on July 22, 1981, and thus became the first Federal judge appointed by President Reagan.

In addition to performing his duties on the district level, Judge Wilkins has served as an appellate judge on the fourth circuit by designation. In October 1985, President Reagan appointed Judge Wilkins as Chairman of the U.S. Sentencing Commission. He has served diligently and enthusiastically on that Commission. Judge Wilkins has received numerous awards from professional and civic groups.

He is married, has three children, and is a deacon in the First Baptist Church. I am very pleased to recommend Judge Wilkins to President Reagan and I am confident he will be an outstanding circuit court judge.

I might say that last year, and I believe the year before, the South Carolina Bar selected him as the most respected and outstanding judge in the State, which is a very outstanding compliment to him.

We are very pleased to have you, Judge Wilkins and Mrs. Henderson.

Now I want to hear from the able and distinguished Senator from South Carolina, Senator Hollings.

STATEMENT OF HON. ERNEST F. HOLLINGS, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator HOLLINGS. Thank you very, very much, Mr. Chairman. I heartily endorse your selections of both Mrs. Karen Henderson to the district court and Judge Billy Wilkins for our fourth circuit court of appeals.

As to Mrs. Henderson, only last Sunday I was in an occasion with Hugh G. Sinkler, the eminent bond attorney from my home town who is nationally known in legal circles. Hugh G. turned to me and he said:

> Fritz, I understand Strom is going to appoint Karen Henderson. Don't get her appointed before June 20 because she has got to make an argument to me over there and for several States in the original jurisdiction of the U.S. Supreme Court.

So I said I will talk to Senator Thurmond about that because it is in his hands.

I only emphasize that because of the high respect that the South Carolina Bar and outstanding lawyers like Hugh G. Sinkler and yourself and others have over the entire State of South Carolina for Mrs. Henderson's abilities.

As the first female judge to come from your State and mine, I know of no better selection. My friend, the attorney general now, former attorney general who has since passed, Dan McLoed, bragged on Mrs. Henderson's abilities some years ago and that makes me feel particularly warm toward her appointment because as I believe, as Judge John Sirica told me years ago, never appoint anyone to the bench that hasn't been in the pits, does not understand the operation of the court room, the balancing of equities and the parties as well as the judicial procedure and the legal issues involved.

Mrs. Henderson is eminent in that particular regard. She has had very, very broad experience from the local State courts to the original jurisdiction of our own U.S. Supreme Court, she is current with it. She has been one of the most sought after members in the lecturing field of our legal services education, continuing education, I should say, in South Carolina, so I would ask unanimous consent that my statement be accepted on Mrs. Henderson and also on Judge Wilkins, Mr. Chairman.

I would add a word about Judge Wilkins. Of course, we politicians are glad to be proved honest. We said he would make an outstanding judge when we recommended him back in 1981. He has been already tried and true and up to the top and selected by our own bar, which are predominantly Democrats who select a Republican judge, as the outstanding judge. President Reagan has him on our sentencing commission as chairman there, which I understand he will continue his duties as a member of the fourth circuit.

So if you can accept my full statement on both of the nominees, I would be delighted to answer any questions that you have. It is just with tremendous pride that I join with you and your recommendation for these two appointments.

Thank you.

The CHAIRMAN. Thank you very much. I have no questions. You have highly endorsed both of these candidates and I think that is res ipsa locutor. It speaks for itself.

I will see if my distinguished colleagues have any questions.

Senator METZENBAUM. Mr. Chairman, I think that you have made two good nominations and it is rather significant to me that in order to really provide quality appointees that you have seen fit to find a young lady who was born in Ohio, and I can only say that if Judge Wilkins were also born in Ohio then I know I would be particularly enthusiasic but I am about 50 percent enthusiastic and almost as enthusiastic about Judge Wilkins. I think the nominees are fine.

The CHAIRMAN. Thank you very much, Senator.

The distinguished Senator from Illinois.

Senator SIMON. Thank you, Mr Chairman. I just want to express my appreciation to you and to your colleague, Fritz Hollings, for these two nominees. As you know particularly on the court of appeals, I have been complaining about the lack of quality in some of the nominees and I am pleased to note that, Judge, you have received a well qualified rating from the American Bar Association. Jim Holderman, who is the president of the University of South Carolina, speaks very highly of you. He called me. I am very pleased to see this quality of nomination.

In the case of Mrs. Henderson—and I do not know whether I should tell you this, Mr. Chairman, but the State democratic chairman, Bill Youngblood, called and told me that she is a very fine person. You may want to withdraw the nomination here now, Mr. Chairman.

The **Chairman**. No. I am glad he endorses her.

Senator **Simon**. OK. But I commend you as well as the two nominees.

The **Chairman**. Thank you very much, Senator.

Without objection, Senator Hollings, I know you are busy and you may stay if you wish or you are excused if you wish to leave.

Senator **Hollings**. Thank you very much.

The **Chairman**. Thank you for your appearance.

Senator **Hollings**. I appreciate it.

The **Chairman**. Without objection, we will place a letter here by Congressman Campbell endorsing Mrs. Henderson in the record and a similar letter endorsing Judge Wilkins.

[The letters referred to follow:]

Statement By The Honorable Carroll A. Campbell, Jr. (4th, S.C.) on the Nomination of The Honorable William W. Wilkins to the Fourth Circuit Court of Appeals

Mr. Chairman and members of the Committee it is indeed both an honor and pleasure for me to have this opportunity to offer my support for the Honorable William W. Wilkins' nomination to the Fourth Circuit Court Of Appeals. I believe that Judge Wilkins will be an outstanding addition to this Court.

Judge Wilkins should be quite familiar to the members of this Committee, since he has appeared before you on two earlier occasions: first for his confirmation hearing to the Federal District Court of South Carolina in 1981, as President Reagan's first appointment to the federal bench, and again in 1985 for his confirmation as Chairman of the United States Sentencing Commission.

Judge Wilkins has had a distinguished academic career. As a graduate of the University of South Carolina School of Law he was recognized by the faculty as the Outstanding Graduate of the Year. He was also Editor-in-Chief of the South Carolina Law Review, Captain of the South Carolina National Moot Court Team, and a member of the Wig and Robe.

Judge Wilkins' professional career has been equally as impressive as his academic career. He served as a law clerk for former Chief Judge Clement Haynsworth, Jr. and as a legislative assistant to the present Chairman of this Committee, Senator Strom Thurmond. In 1970 Judge Wilkins entered private practice until 1975 when he was sworn in as Solicitor for the Thirteenth Judicial Circuit of South Carolina. As Solicitor, Judge Wilkins tried a substantial number of criminal cases.

Since his appointment to the federal bench Judge Wilkins has established a reputation as an outstanding jurist who has maintained a court noted for fairness and impartiality. Judge Wilkins has become an outstanding member of the Court, who has earned the respect and the commendation of those members of the Bar who have had the privilege to appear before him.

I would like to conclude my remarks by saying that Judge Wilkins not only has my complete respect for his abilities as a jurist but also as a close personal friend. I have known Billy for most of my life and I consider him as an individual whose reputation and character are beyond reproach. It is an honor for me to appear before this committee on behalf of such an outstanding individual.

Statement By The Honorable Carroll A. Campbell, Jr. (4th, S.C.) on the Nomination of Karen LeCraft Henderson to the Federal District Court of South Carolina

Mr. Chairman and members of the Committee, it is indeed both an honor and pleasure for me to have this opportunity to offer my support for Karen LeCraft Henderson's nomination to the Federal District Court Of South Carolina. I believe that Ms. Henderson will be an outstanding addition to this Court.

In the seventeen years that Ms. Henderson has been in the legal profession and public service, she has established an excellent reputation. After Karen graduated from Duke University and the University of North Carolina School of Law, she opened her own practice in Chapel Hill, North Carolina. In 1973 Karen joined the staff of the South Carolina Attorney General Daniel McLeod. Karen's responsibilities included representation and counsel to the State medical and dental boards and the 46 county governments. As a Deputy Attorney General of South Carolina, she represented the State in matters involving major constitutional issues and always did the job admirably. During her legal career, Karen has appeared before every state and federal court including the United States Supreme Court, the South Carolina Supreme Court, the Fourth Circuit Court of Appeals, and every South Carolina and federal trial court. Although Karen has gone into private practice as a partner in the distinguished law firm Sinkler, Gibbs and Simmons, she continues to represent the State in matters involving important constitutional questions. Through all of her experience, Karen has become one of the most distinguished members of the South Carolina Bar.

It is indeed a pleasure for me to endorse Ms. Henderson's nomination. Karen has the ability and temperament to become an outstanding jurist. I have had the opportunity to work closely with her on several occasions and I have always been impressed by her integrity, determination and knowledge of the law. I consider Karen not only an outstanding attorney but a valued friend. South Carolina will indeed be proud to have Karen serve on the federal bench and I am again honored to appear before you today to speak on behalf of her nomination to the Federal District Court of South Carolina.

Riley, Riley, Laws & Stewart
Attorneys & Counsellors at Law
218 HENRIETTA STREET
MAILING ADDRESS
P. O. BOX 10084
Greenville, South Carolina 29603
TELEPHONE (803) 242-6624

EDWARD P. RILEY
EDWARD P. RILEY, JR.
J. TERRY LAWS
CHARLES R. STEWART

SIMPSONVILLE OFFICE:
111 E. CURTIS STREET
SIMPSONVILLE, S. C. 29681
TELEPHONE 963-4581

June 5, 1986

The Honorable Joseph R. Biden, Jr.
U. S. Senate
482 Russell Senate
Office Building
Washington, DC 20510

Dear Senator:

I have known Judge Wilkins since he was a child and watched his development over the years. While in law school at the University of South Carolina he received every award and honor available, including being selected as the Outstanding Law School Graduate of the Year when he graduated. After service in the United States Army he returned to Greenville and entered the private practice of law. In 1974 he was elected in a general election as Chief Prosecuting Attorney for our Judicial Circuit. He was the first individual ever elected to this office on the Republican ticket in over one hundred years. He made an outstanding record, administered this important office in fair and impartial manner, believing, as I do, that partisan politics have no place in the administration of justice. Because of the manner in which he administered his office, when he offered for re-election four years later, the Democratic Party offered no opposition. Indeed, many loyal Democrats endorsed his candidacy. In 1980 he was appointed U. S. District Judge for the District of South Carolina. Again, he has done an outstanding job, ruling impartially and fairly without any hint of favoritism or political influence. He has the reputation of a judge who simply calls it like he sees it, always adhering to the rule of law. The Trial Bar in South Carolina, plaintiff and defense attorneys alike, have all endorsed his nomination to the Court of Appeals for the Fourth Circuit even though we regret that he will be leaving the trial bench.

I have been a loyal Democrat all of my life. I have served as County Chairman, State Chairman, and on the Executive Committee. I feel it is my duty to my country to personally endorse Judge William W. Wilkins to be a Judge of the Fourth Circuit Court of Appeals. He is fair, fearless, impartial and thoroughly competent to fill this high position.

I am a card carrying member of the Greenville County, State of South Carolina, the National Democratic Party, as well as a contributor to elect and re-elect Democratic senators and congressmen and I am actively engaged in the re-election of my long-time friend, Fritz Hollings.

I remember very pleasantly your visit to our state and that you made a very favorable impression on all who met you.

For your information I just talked with my son, Governor Dick Riley, and he said to be sure and give you his regards. He further said that he endorses everything good that I have said about Judge Wilkins and hope you will add your support to his nomination.

I respectfully request that you and the other Democrats on the committee strongly support the nomination of Judge Wilkins for judge of the Court of Appeals for the Fourth Circuit.

Hoping and working for a Democratic Victory in 1986.

Very respectfully,

E. P. Riley

E. P. Riley

EPR/jeg

The **Chairman.** I understand, Judge Bowen—I believe we confirmed you here several years ago, we are very pleased to have you. Do you want to speak on behalf of either of these people?

STATEMENT OF HON. DUDLEY H. BOWEN, JR., U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF GEORGIA

Judge Bowen. Well, Mr. Chairman, I do not want to take up your time. I would like to briefly make a statement to you and the distinguished members of the committee. While I am not in the State or the district or the circuit of these distinguished nominees, I do serve just across the river in Augusta, GA, on the district court bench there, just across the river from your home, I am proud to say.

I am delighted to meet Ms. Henderson. I have the pleasure of knowing Judge Wilkins. I had the pleasure of knowing the excellence of his service on the U.S. Sentencing Commission.

I had the opportunity just this Monday to get to know something about the process in which they have developed new sentencing guidelines which, quite frankly, will put us district judges to a lot of work. But I recognize those guidelines as being responsive to the mandate of the Congress, responsive to the intent of the Congress, responsive to the societal needs and responsive to the needs of district judges to have some latitudes and discretion in molding a sentence to achieve justice.

I simply want to say that I have every confidence and I can assure you of what you know already, that this gentleman, Judge Wilkins, will be a scholarly but sensible appellate court judge, a man who understands the difficulties and the problems of the trial judges whose decisions he will have to review, and I am proud to have been here and say something on his behalf.

Thank you, Mr. Chairman

The **Chairman.** Judge, that is very nice of you to appear here and we value highly your remarks because you have a splendid reputation, making an excellent judge yourself.

Now, with regard to Judge Wilkins, without objection, we will place your resume in the record at this point.

I understand that Senator Dixon of Illinois is here and wanted to introduce William D. Stiehl to be U.S. district judge for the Southern District of Illinois, so if you will just have a seat back there for a few moments.

Mr. Stiehl, if you will come forward.

STATEMENT OF HON. ALAN J. DIXON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator **Dixon.** Mr. Chairman, I want to thank you very much for accommodating me this way. As the chairman knows, we serve together on the Armed Services Committee and I have a major amendment up in the committee at this point in time. But, Mr. Chairman, I am deeply privileged to present to you a warm personal friend of a lifetime, Mr. William Stiehl, of Belleville, IL. Mr. Chairman, I will have prepared remarks, but I would like to tell you that Bill Stiehl and I were born and raised in the same neighborhood in Belleville, Illinois, and lived less than a block apart.

In the beginning of our professional career, the Chairman will be interested in knowing that Mr. Stiehl was the Republican precinct committeemen in precinct 1 of the seventh ward in Belleville, and I was the Democratic precinct committeeman there, and I know the chairman will be greatly pleased to know that he regularly beat me in his precinct about 5-to-1. He went on to be one of the outstanding lawyers in our part of the world and was the Republican State central committeeman in our congressional district for many, many years, Mr. Chairman.

His wife, who is in the room—and I wish she would stand—is also a lifetime friend, Celeste Stiehl, Republican State representative and the assistant leader in the Illinois House of Representatives of the Republican Party for Gov. Jim Thompson. Would you stand, Celeste?

The CHAIRMAN. If you have any other family or friends, Mr. Stiehl, they can stand now, if they will.

Mr. STIEHL. She and I are all that are here.

The CHAIRMAN. I see.

Senator DIXON. Mr. Chairman, this man is a devout, dedicated Republican of a lifetime, and notwithstanding that, Mr. Chairman, I endorse him with all the enthusiasm at my command. He will make the finest U.S. district court judge in the history of America, and it is my pleasure to come here and present his name to this committee.

The CHAIRMAN. So there are some good Republicans after all.

Senator DIXON. Well, at least you and Bill Stiehl, Mr. Chairman, that I have met in my lifetime.

The CHAIRMAN. Thank you very much. Knowing you, Senator, as I do, I know you are fair and just and it is a pleasure to serve in the Senate with you and it is a special pleasure to serve with you on the Armed Services Committee.

Senator DIXON. Thank you, sir.

The CHAIRMAN. And we appreciate your presence.

[The prepared statement of Senator Dixon follows:]

STATEMENT BY SENATOR ALAN J. DIXON INTRODUCING WILLIAM D. STIEHL

Mr. Chairman and distinguished colleagues of the Senate Judiciary Committee, it is an honor for me personally to introduce to you today my great friend, William D. Stiehl.

I have known Bill Stiehl since childhood. He is a lifelong resident of Belleville, IL—my own home town. He is a great lawyer and a great public servant. Most of all he is truly a great friend, a man I respect on two levels—personal and professional.

Mr. Chairman, I attest to the integrity of Bill Stiehl. I attest to his probity, his intelligence and his capacity for fairness under the law. William D. Stiehl offers the Southern District of Illinois a rare opportunity to gain a district judge with a proven record of honor and straightforwardness.

After graduating from the University of North Carolina, Bill Stiehl attended the St. Louis University School of Law. He completed his formal legal education in 1949. In that year, Bill Stiehl entered into private practice in Belleville, IL.

From 1950 to 1952, William Stiehl served in the Korean war. He was legal advisor to the naval delegate at the Korean Armistice Conference. He returned to Illinois in 1952 and began a universally respected career as a lawyer and public servant.

From 1956 to 1960, Bill served as assistant State's attorney for St. Clair County. From 1970 to 1973, he served as a special assistant attorney general. He is the president of Belleville Township High School and Junior College Board of Education.

Members of the committee, I cannot begin to say enough about the accomplishments and personal integrity of my friend William Stiehl. He has never failed his home town or his State, and I am certain he will never fail the law as a United

States district judge. I therefore respectively recommend William D. Stiehl as United States district judge for the Southern District of Illinois.

Senator SIMON. Mr. Chairman, if I may just add, since Bill Stiehl is from Illinois, I do not know that I can wax quite as eloquent as my colleague who says he is going to be the best judge in the history of America, but he will be a good judge and I am very pleased to join in that endorsement. Bill Stiehl is a person of good personal character and we are very pleased to be associated with this nomination.

The CHAIRMAN. Thank you very much, Senator.

Senator DIXON. I thank my colleague. I wanted to say, Mr. Chairman, that his name was submitted by Senator Simon's predecessor, Senator Percy. He is endorsed by all nine Republican Members of the House and our congressional delegation, including the distinguished Republican leader in the House, Bob Michel. And I certainly thank the Chair and my distinguished colleagues for their kindnesses.

The CHAIRMAN. That is a high compliment. Thank you very much for appearing.

Now, Mr. Stiehl, if you will have a seat back there, we will proceed.

Now, I will swear all of you at one time and you can all stand and raise your hands, all five of you.

Will the testimony given in this hearing be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. WILKINS. I will.

Mr. STIEHL. I will.

Ms. HENDERSON. I will.

Mr. JENSEN. I will.

Mr. CONWAY. I will.

The CHAIRMAN. Judge Wilkins, if you will have a seat. Do you have any family or friends here you want to introduce?

TESTIMONY OF WILLIAM W. WILKINS, JR., OF SOUTH CAROLINA, TO BE U.S. CIRCUIT JUDGE FOR THE FOURTH CIRCUIT

Mr. WILKINS. Several members of the U.S. Sentencing Commission who are here today. I would like to recognize them, if I might, Mr. Chairman.

The CHAIRMAN. I would be happy to have you do that.

Mr. WILKINS. The first one is one that you know, Mr. Chairman, John Steer, who is the deputy general counsel of the U.S. Sentencing Commission.

The CHAIRMAN. A very able attorney and worked with me as long as he cared to stay and you stole him away. [Laughter.]

Mr. WILKINS. Ms. Suzanne Conlon is assistant district attorney from Chicago, and she is on detail to the Sentencing Commission and has been working with us for the past several months.

The CHAIRMAN. We are glad to have you with us.

Mr. WILKINS. Russell Ghent and Dave Tevelin, both are attorneys working with the Sentencing Commission. Mr. Paul Martin is information director.

The CHAIRMAN. We are pleased to have you gentlemen.

Mr. WILKINS. Jack Williams, from South Carolina. The clerk of the Court's daughter, Elizabeth Williams, is administrative assistant with the Sentencing Commission.

The CHAIRMAN. We are glad to have you with us.

Mr. WILKINS. And Brenda Allen and Debra Dill also are staff members with the Commission.

The CHAIRMAN. It is a pleasure to have you.

Mr. WILKINS. I noticed in the audience, Senator, U.S. Magistrate Bob Carr. I understand he is here on other business, but he is here.

The CHAIRMAN. Fine. Judge Carr, we are glad to have you with us.

Mr. WILKINS. I think that is all I have to introduce, Senator. Thank you.

The CHAIRMAN. Thank you very much. I just have a few questions.

Judge Wilkins, you presently serve as U.S. District Judge for the District of South Carolina, a position you have held since 1981. You also serve as Chairman of the U.S. Sentencing Commission. Would you please tell the committee what progress you are making on the Sentencing Commission and how you feel future sentencing guidelines will impact on the judiciary?

Mr. WILKINS. Well, I think we are making significant progress, Mr. Chairman. We are on schedule now. We will be briefing staff members of the Judiciary Committee in the first part of July to bring staff members up to date on the progress that we have made.

We are taking a very intellectual approach to the drafting of these guidelines because they must be comprehensive. But as Judge Bowen pointed out, we are using trial judges, defense attorneys, prosecuting attorneys, and probation officers who actually work in the field to come in regularly and meet with us in working groups so that we can make sure that not only are the guidelines intellectually sound but they are workable and practical as well.

I think they will have a dramatic impact on the Federal judiciary. Indeed, it is going to change in a wide sweeping way the way business is done today as far as sentencing is concerned, but I am convinced that the guidelines will be well received by the Congress and by the American people.

The CHAIRMAN. Judge Wilkins, as a trial judge at the Federal district court level, I am sure you have had a number of drug cases come before your court. I wonder what in your opinion can the judiciary do to assist in stopping the widespread sale of drugs in this country?

Mr. WILKINS. Well, I think the drug problem is most serious in this country, Senator. It must be approached from two standpoints: One, the supply of narcotics, and the other the demand. The judiciary can do little about the demand, that is those in society who want to buy the drugs, and so we need a real effort to educate not only young people but adults as well as to the dangers of drugs and the fact that they are illegal to possess and use, and if that message can ever be put across to the American people it will dry up the demand for drugs.

The supply end is where the judiciary comes in and I feel, as you know I feel very strongly about those who distribute narcotics in our society, and I think the judiciary can sanction very severely those who violate those laws and perhaps make the price too high to pay for those who would contemplate that type of activity.

But the total answer will not come just from law enforcement, it will not come from the courts, but it must come from an educational process of the American people as well.

The **Chairman**. I am very glad to hear you say that, because the law enforcement people do all they can. After all, drugs would not be sold if there was not a demand for them and in my judgment to reduce that demand has got to be a wider, broader educational process among the people as a whole.

Judge Wilkins, during your service as a Federal district court judge, what problem areas if any have you been able to identify in the criminal justice system at the Federal level?

Mr. **Wilkins**. Perhaps two areas come to mind, Mr. Chairman. One is the unwarranted disparity in sentences that are given to defendants, similar defendants who have committed similar crimes today in our system receive greatly dissimilar sentences, and I think this is a major ill in our system and one that the Congress identified and really it was the reason for the creation of the U.S. Sentencing Commission.

The guidelines that we will submit to Congress will by and large solve that problem.

I think another problem that I can identify from my personal experience is the long delay sometimes, the inordinate amount of time that it takes for a case to be finally resolved on appeal after a trial has been held. The Congress has taken care of that problem in the Speedy Trial Act at the trial level, but too long, many months and sometimes even years go by before the resolution is finally concluded on appeal and I think this can be corrected by the judiciary at the appellate level simply by giving an expedited service to those appeals.

I do not know whether the legislation would ever accomplish that, but if the appellate courts would identify criminal cases particularly and serious cases and either affirm or reverse those decisions in a reasonable period of time, I think the interest of justice will be better served.

The **Chairman**. Judge Wilkins, the phrase "judicial activism" is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority. What does the phrase "judicial activism" mean to you?

Mr. **Wilkins**. Well, that phrase has come to mean an attempt by members of the judiciary to act as super legislators to, rather than interpret and apply the law, but to in fact legislate law that is the role of the congressional branch. I think this is always a tension between the Congress and the judiciary, but the Congress should recognize as well as the judiciary that we are totally separate branches of Government, we have separate responsibilities and separate authority and should not invade the province of the other. It is a delicate balance for a judge to find in addressing the interpretation of statutes passed by the Congress, but the anchor that every judge should have I believe, Mr. Chairman, is to try to approach the interpretation of law in this context; what does the statute say, not what I want it to say; what was the intent of the drafters of the legislation, rather than what would I have done were I a Congressman or a Senator.

The CHAIRMAN. Thank you very much. I want to congratulate you on your appointment by President Reagan, congratulate you that you have the support, of course, of myself who recommended you and Senator Hollings. I know of no criticism or objection on the part of any member of this committee. You have done a fine job as a judge, you have been fair, and have dispensed justice and have shown equality of feeling among people and I wish you a long tenure on the bench.

Mr. WILKINS. Thank you very much, Mr. Chairman. I appreciate those words.

The CHAIRMAN. You are the kind of man I think who would adorn the Supreme Court of the United States. We are very honored to have you from South Carolina.

Mr. WILKINS. Thank you, Mr. Chairman.

The CHAIRMAN. Senator.

Senator SIMON. Thank you, Mr. Chairman.

He is promoting you pretty rapidly here, I hope you notice, Judge. I noticed, Mr. Chairman, that he overcame one handicap in his background here. He served as legislative counsel of a fellow named Strom Thurmond at one time.

The CHAIRMAN. Yes, that is where I had a chance to size him up.

Senator SIMON. Well, again I commend the chairman for this nomination and what we hear about you is very good, Judge. Let me just ask one question: Canon II of the American Bar Association's Code of Professional Responsibility says every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. How have you lived up to that in your life?

Mr. WILKINS. Well, I was in private practice in South Carolina for about 4 years before I was elected solicitor, which is a public position, and in that capacity as a private attorney we assisted individuals who were unable to pay for private fees on a local basis and were involved with the bar association in that program. And I think even before it became popular to perhaps provide pro bono service, we had a very good organization in South Carolina, particularly in Greenville, in addressing the problem of the indigent, before the Legal Services really became very active in that part of our State.

As the chief prosecuting attorney for a large circuit in South Carolina, Senator, I was in a position to assist people who could not assist themselves, to help people right some wrongs who were unable to do themselves, and in that capacity I think I lived up to the spirit of the the canon of ethics that you refer to, although being in the public service it perhaps was not addressed particularly to a prosecuting attorney.

But I recognized the need for those of us who have been more fortunate to assist those perhaps in less fortunate situations and have tried to do that.

Senator SIMON. Thank you. I have no further questions, Mr. Chairman.

Mr. WILKINS. Thank you, Senator.

The **Chairman**. Thank you very much. You are now excused and I hope the committee can act promptly and the full Senate can, too, because there is a vacancy that should be filled as soon as possible. Thank you very much.

Mr. **Wilkins**. Thank you, Mr. Chairman. Thank you, Senator Simon.

The **Chairman**. Ms. Henderson, will you come around. I have an urgent call I want to take and I will ask my distinguished colleague from Illinois if he would go ahead with the hearing.

Senator **Simon** [presiding]. OK. All right.

First of all, congratulations to you, Mrs. Henderson, for being nominated by the chairman of the Judiciary Committee. The chairman and his staff subjected this nomination to special scrutiny and that scrutiny has resulted in a very favorable reaction by my staff, people who know about you.

Let me ask the same question of you that I asked of Judge Wilkins, what you have done to be of assistance to the disadvantaged.

TESTIMONY OF KAREN L. HENDERSON, OF SOUTH CAROLINA, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF SOUTH CAROLINA

Ms. **Henderson**. Senator, when I practiced in North Carolina, and it was in private practice, I was appointed to represent a criminal defendant one time and, of course, made myself available to do that at any time that I might have been called on in the future to do it.

When I was in the attorney general's office, which was the major part of my career, 10 years, of course I was not able to be appointed to defend indigent defendants or otherwise help the private sector.

Since I have left the attorney general's office, since 1983, I have been appointed again to represent indigent defendants and am available to do that in the future. I think that when I was in the attorney general's office, hopefully the legal counsel that all of us in that office provided to the government at all levels, from school districts to city councils and the boards and commissions of State government, hopefully our legal counsel of those public bodies helped them function properly and helped them perform their duties which, of course, would aid all citizens, including the disadvantaged. And the pro bono work that I have done since I left the attorney general's office has really been in my area of specialization, which is government law, and I have on a regular basis lectured to the annual meetings of the Association of Counties and special purpose districts, school districts and city councils and have also advised local governments which, of course, have limited resources and their lawyers without compensation on a regular basis.

Senator **Simon**. From time to time we hear allegations that there are those in the Justice Department who ask questions that may not be unethical but they are somewhat awkward. Did you feel at anytime that anyone asked questions that were in any way improper before you were nominated?

Ms. **Henderson**. No, Senator.

Senator SIMON. Let me ask some questions on behalf of the chairman. Mrs. Henderson, you have been a practicing attorney since 1969. From 1973 to 1982, you served with the office of attorney general, State of South Carolina, and since 1983 you have been in private practice in Columbia, SC. During your career, you have engaged in general litigation at both the State and Federal levels. In fact, approximately 30 percent of your court appearances have been before Federal courts. With this background, do you believe litigants in State courts received the same level of fairness, due process and quality of justice as do litigants in Federal courts?

Ms. HENDERSON. Yes, Senator. Based on my experience in the State and Federal courts of South Carolina, I think both systems have scrupulously protected and guaranteed the rights of litigants.

Senator SIMON. The second question—this is from the chairman again—Mrs. Henderson, what are your views on the primary purpose of the criminal justice system?

Ms. HENDERSON. I think that the penalties that the public enacts through its legislature are enforced. I think at the same time those objectives are being achieved that the constitutional rights of criminal defendants, including the right to a fair trial, of course, most be observed and guaranteed at the same time.

Senator SIMON. We asked the first two questions. I have no further questions either, Mr. Chairman.

The CHAIRMAN. Mrs. Henderson, how would you handle an instance in which counsel for one of the parties in your court was obviously not a skilled litigator or was not prepared to adequately represent the interests of his or her client?

Ms. HENDERSON. I think I would first try to distinguish between a lawyer that I thought was merely inadequate or that I might disagree with rather than incompetent and would not in any way intrude on a lawyer's decision that I just happened to disagree with.

I also think that in the case of a civil trial, where constitutional rights are normally not involved, I would be very hesitant to again intrude into the strategies and opinions of the lawyer. However, a criminal trial, where constitutional rights are involved, I think that it would be my duty in defending the Constitution and insuring that the defendant received a fair trial, that if I felt his constitutional rights were not being protected or were being jeopardized by a lawyer, then I would feel that I would have to become involved in it.

I think what I would do in that case is probably either through a side bar or a recess, with his adversary present certainly, tell him that I thought he needed to do this or needed to do that.

The CHAIRMAN. Mrs. Henderson, in response to a portion of the committee questionnaire on judicial activism, you stated in part, "The law has developed over centuries and has the weight of those centuries behind it. It cannot be altered on a case-by-case basis without abandoning the major reason for the judicial branch—stability."

Mrs. Henderson, are there any circumstances under which a judge should attempt to establish new judicial precedents, and if so what criteria would you consider in order to determine the propriety of reversing an existing precedent?

Ms. HENDERSON. Senator, I respect precedent as a lawyer and I would not only continue to respect it as a judge but I would be duty-bound as a judge of an inferior court to respect precedent. I would also be duty-bound to defer to the acts of the coequal branch of Government, the legislative branch. However, my highest duty, of course, would be to uphold and preserve the Constitution. I think really the only instance in which I would feel authorized as a judge of an inferior court to reverse existing precedent would be if, after a review of that precedent and after a review of the Constitution, I felt that the precedent was clearly erroneous and, probably most important, if the facts in the particular case before me clearly warranted a review of the existing precedent.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. I have no further questions, Mr. Chairman.

The CHAIRMAN. Mrs. Henderson, I want to congratulate you on your appointment by President Reagan. I was very pleased to submit your name as the first female Federal judge in South Carolina, and I predict you will have a long and successful tenure on the bench and I wish you well.

Ms. HENDERSON. Thank you very much, Senator.

The CHAIRMAN. Do you have any family or friends here you want to introduce?

Ms. HENDERSON. No, I do not, Senator

The CHAIRMAN. Thank you very much.

Senator SIMON. Let me just add again my commendation, Mr. Chairman. I have been complaining from time to time about the quality of the nominees and to your credit you brought forward two stellar nominees and I simply want to commend you.

The CHAIRMAN. Thank you very much, Senator.

Mr. Lowell Jensen, will you come around?

Without objection, your résumé will be placed in the record.

Also, at this point, I wish that a statement of Senator Pete Wilson be placed in the record.

[Prepared statement follows:]

PREPARED STATEMENT OF SENATOR PETE WILSON

Mr. Chairman and members on the Committee, I appreciate the opportunity to appear before you to introduce Deputy Attorney General D. Lowell Jensen, who has been nominated by the President to serve as a judge on the United States District Court for the Northern District of California.

I have known Lowell Jensen for years and I truly admire him. He is one of few individuals I have known in my many years in government about whom I have never heard a bad word spoken. This is particularly noteworthy when you realize that he has served in the government for the last 20 years. Even among those who disagree with Lowell on the substance of a question, there is a very great reservoir of respect.

In addition to the high esteem in which Lowell is held in terms of his character by all who know him, he is widely acknowledged to be an extremely skilled attorney. He was demonstrated this skill in his every endeavor since receiving his law degree from Boalt Hall at the University of California—from his service in the District Attorney's office of Alameda County, to his work in many educational forums, to his membership in many professional organizations, including service as President of the California District Attorneys Association and Chairman of the California Peace Officers Association, Law and Legislative Committee, to his three senior positions at the Department of Justice.

Indeed, he is appearing before the Committee today for his fourth confirmation hearing in little more than 5 years, the prior three appearances following his successive nominations as Assistant Attorney General for the Criminal Division, Associate Attorney General, and Deputy Attorney General—in which position he currently serves.

Before coming to Washington, Lowell Jensen developed a truly enviable reputation as an outstanding prosecutor. He was responsible for the conviction of the perpetrators of a number of serious felonies, including some infamous ones. He successfully prosecuted members of the so-called Symbionese Liberation Army for the assassination of the Superintendent of Oakland Schools, Marcus Foster. He also successfully prosecuted Huey Newton, a founder of the Black Panthers, for the murder of an Oakland Police Officer.

During his exemplary public service, Lowell has undoubtedly sacrificed by remaining in the government during his entire professional careers. It is without doubt that he could easily reap a much higher salary in a private law firm. So, other than his choice to give up the rewards of private practice, Lowell's judgement is without question.

Actually, I would question one other choice Lowell has made during his career. In his home state of California, Lowell has long been registered as a Democrat. Despite this one slight flaw, I was pleased to recommend him to the President, and that his party registration was not an impediment to his nomination. I trust that it will not serve as a bar to support from either side of the aisle.

I can think of a no more conscientious and capable individual to serve as a federal judge than Lowell Jensen. He received a unanimous rating from my judicial screening committee as being exceptionally well qualified to serve on the District Court, for he assuredly understands the vast responsibility and significant role a District Judge plays in our legal system, and has shown his ability to undertake this responsibility. I therefore urge the Committee to expeditiously report his nomination favorably to the Senate.

TESTIMONY OF D. LOWELL JENSEN, OF VIRGINIA, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF CALIFORNIA

The CHAIRMAN. You have already been sworn, Mr. Jensen, I believe.

Mr. JENSEN. Yes, I have, Mr. Chairman.

The CHAIRMAN. Mr. Jensen, you have served at the Department of Justice, I believe, since 1981.

Mr. JENSEN. That is correct, Mr. Chairman.

The CHAIRMAN. Having held the position of Deputy Attorney General, Associate Attorney General, and Assistant Attorney General for the Criminal Division, now the President has nominated you to be a U.S. district judge for the Northern District of California. Would you tell the committee what you feel will be the most rewarding aspect of serving in this capacity?

Mr. JENSEN. Thank you very much, Mr. Chairman. If I may, I would like to at the outset say thank you for this opportunity to appear and to recognize Senator Simon and Senator Metzenbaum. I would also like to state to the Chair that regrettably my wife could not be here. She is not in Washington today, but I am pleased to have my fellow workers at the Department of Justice, Marilyn Jacobs and Bill McGinnis here, and I would like to recognize them.

Let me state in response to your question that it has been my opportunity in my professional career to be a public lawyer in the County of Alameda, State of California, for many years and then to serve here in the Department of Justice as a public lawyer. So I have served in the executive branch essentially and I am now in a position where thankfully and gratefully the President has forwarded my name for nomination to serve in the judicial branch.

I have spent a great deal of my professional career in courtrooms. I have enormous respect for the judiciary. In the great bulk of those times I have been before very fine judges. There have been occasions when perhaps the judge has not been as strong as I felt the judge ought to be.

It would be my hope and my challenge to be as strong as I could possibly be and to provide each of the persons in the courtroom the kind of respect they are entitled to and the kind of judgment to reach justice that they are entitled to. I think that every litigant, every attorney, every witness, every victim in that courtroom is entitled to respect and dignity and to the decision of the court that would, hopefully, reach justice.

So I view this as a great challenge and an opportunity to enter into the great judiciary of the United States.

The CHAIRMAN. Thank you very much.

Senator Metzenbaum has to leave very quickly and I am going to suspend for a few moments to give him a chance to propound some questions if he cares to.

Mr. JENSEN. Surely.

Senator METZENBAUM. I thank the chairman for his courtesy. I do not expect to have a long line of questions, but I do have some that Mr. Jensen probably anticipates.

I do not have any trouble with your nomination to the bench with respect to your qualifications. You are qualified. You are competent. I do not have any doubts about that. But I have some trouble with respect to your judgment.

You have made some decisions in criminal cases that deeply trouble me. I have told you that over the telephone. These decisions have had far-reaching effects on many people's lives. They are decisions that are not unlike the decisions you will be making as a judge.

In particular, I am troubled by your prosecutorial decisions in three cases of serious misconduct by corporations and corporate officials. Now, I know your answers are going to be, "well, we had to make a judgment call," "we were not sure we could win the case." So I will listen carefully to your answers, but I think you have an uphill fight to convince me that the decisions you made were made with respect to the best interests of the American people.

Now, in 1984—these are all very serious cases—the Justice Department terminated its investigation of Syntex Laboratories for making and selling defective and life-threatening baby formula. Do you recall your involvement in that matter?

Mr. JENSEN. Yes, Senator.

Senator METZENBAUM. Now, in that case 20,000 babies were exposed to the formula, and some died. Some will suffer physical disabilities and learning difficulties for the rest of their lives. The Department of Justice refused to file a single charge.

At that time, Richard Willard was the head of the Civil Division and he was handling the case. He has previously told the committee that he was new to the job at the time and he relied heavily on your advice. Is that your recollection of the facts?

Mr. JENSEN. I believe in the process it would be his responsibility and his Civil Division responsibility to bring the case through, and in my supervisorial state I would be a part of the supervision of this case and so there was such supervision in those instances.

Senator METZENBAUM. Now, on April 11, 1984, you received a memo from Mr. Willard which solicited your "advice on whether to prosecute." Mr. Willard wrote, "Because the question is a difficult one, I would benefit from your views." In the same memo, Willard told you, "We are aware of at least 247 infants who had documented health problems while being fed these formulas. These problems range from very minor illness to death." Willard continued, "The facts are basically undisputed and indicated that Syntex may have violated section 331 of the Food, Drug, and Cosmetic Act which prohibits the transportation in or introduction into interstate commerce of adulterated or misbranded food." What was your advice to Mr. Willard?

Mr. JENSEN. The advice essentially was to go over the case with reference to the threshold standards that are necessary for filing criminal charges. The Department of Justice has principles of prosecution upon which it carries out its business. Those principles of prosecution in criminal areas are essentially ones that deal with both the issues of the necessary elements that go to make up the criminal charge and the evidence and the facts that are available to prove it.

So my advice was essentially to look at and my discussion with reference to this case would be to look at the case in terms of whether or not the threshold standards of the Department of Justice in terms of filing criminal charges were met and they essentially mean that there is evidence to prove each of the elements of a corpus delicti, that the evidence is available to prove that and that the evidence is of sufficient convincing weight to a factfinder to justify our finding.

So my discussion with him was as to whether or not those threshold elements were present in that particular case.

Senator METZENBAUM. Did you tell him that you did not think he ought to go forward with the prosecution?

Mr. JENSEN. I believe that the decision is based upon those threshold standards. I cannot remember exactly what the discussions we had, but the ultimate decision that we would not go forward would be based upon the threshold standards.

Senator METZENBAUM. Was that your advice and judgment?

Mr. JENSEN. Well, ultimately it would become my responsibility to see that that was the decision. If there was any dispute about that, if the decisions were one where it was, one, brought up to me to make a decision, then I would make it.

Senator METZENBAUM. Did you make it in that case?

Mr. JENSEN. I believe that it was brought up to me. I do not remember the exact circumstances. I believe in that instance it was one of those cases where the decision was such that I would be called upon to not necessarily simply be told about a decision but rather to participate.

Senator METZENBAUM. So that you accept the responsibility?

Mr. JENSEN. Yes.

Senator METZENBAUM. Were you aware that the chief counsel of the Food and Drug Administration had argued vigorously that Syntex and some corporate officials should be prosecuted?

Mr. JENSEN. I believe so.

Senator METZENBAUM. The FDA chief counsel told the Department of Justice that existing information fully justifies prosecution—that is a quote—of the company and at least one individual.

He wrote that a conviction "would stand for the proposition that carelessness is not to be tolerated and should therefore have a significant deterrent effect on company and individual conduct generally, as would any other conviction for permitting substandard manufacturing procedures."

In view of that advice from the FDA chief counsel, who dealt with these matters on a daily basis, why were no charges filed? You had evidence that Syntex put out a dangerous product and mislabeled it. The FDA pleaded with you to go forward, explaining, "In view of the serious public health consequences of Syntex's violation of the act, prosecution is justified." The Department admitted that the facts were undisputed and that Syntex violated the law. Why did you say no?

Mr. JENSEN. There are occasions when the agency with enforcement responsibility or through their initial responsibility brings cases and they bring them to the Department for making the decision, as I pointed out, which is the responsibility of the Department, based upon, once again, as I stated, the threshold in terms of the facts and law on the case. Any decision in this case was premised upon precisely that. We would not do it just to be at odds with the FDA or any other client agency. We would do it based upon what we feel are the responsibilities and it is a fact and law context question that would be the basis for any decision I made.

Senator METZENBAUM. Did you refuse to go forward or refuse to advise Mr. Willard to go forward because Mr. Willard explained that he was concerned about the momentous consequences to the accused, not to those who had died or the children, and the fact that a—and he went further on to say that a prosecution would not benefit society?

Mr. JENSEN. No; that would not be my decision. I would not base a decision on that premise. The impact upon the accused person by criminal charges is in that sense irrelevant. If the criminal charges are existent in law and in fact, there is no reason why they should not be brought.

In this instance also, as you pointed out, there were devastating consequences of some of the activity. The real issue, however, has got to be not those consequences to those who were harmed but rather the case in terms of its fact and law as to whether or not it will fit within the statutory structure. So in both instances it is my responsibility to make a decision independent of that.

Senator METZENBAUM. Well, why did Willard talk about the momentous consequences to the accused and that the prosecution would not have benefited society?

Mr. JENSEN. I do not know why. He may have just brought that out, but that would not be a part of any decisional process for me.

Senator METZENBAUM. Do you agree that consequences to the Syntex Corp. outweighed the benefits to society and that would have to be outlined?

Mr. JENSEN. No; it would not be a part of any judgment I would make in terms of criminal charges. As I said, that is not the balance. The balance is one of evidence.

Senator METZENBAUM. Besides the argument on the side of benefits, the Department—your Department—also cited case law as "exhorting circumspection in dealing with matters of this sort." I am frank to say that I found that curious, since the Supreme Court cases the Department cited were both upheld successful criminal prosecutions.

For example, in *U.S.* v. *Park,* the Court stated,

> The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.

Do you agree with that decision?

Mr. JENSEN. I am not sure that I know what it is that you mean by "agree with the decision." If what we are saying is that when the decision says something about circumspection, that circumspection is an element of the decision as to whether or not you should go forward, I would not agree with that.

If what it suggests is that although the facts in law are there, you can prove the case, that circumspection says to you do not go forward, I would not agree with that.

I think the threshold question, as I say, is whether or not you can prove it. If you can prove it, whether or not it has an impact upon a corporate defendant, the individual defendant, I see no reason why you should not go forward.

Senator METZENBAUM. As a judge, what kind of considerations will you give to the momentous consequences to the accused when it comes to sentencing corporate officials? Will they be treated differently than others who appear before you?

Mr. JENSEN. No, they would not. I think, as Judge Wilkins has pointed out, that one of the issues before a judge in the rather awesome task of imposing punishment or sanctions upon individuals before them is one that requires equal protection essentially, and that people should be treated equally for equal conduct. That has always been a part of my background. I have been a part of developments in California law and the law here nationally, which I believe lead to that kind of treatment.

I firmly believe in the notion that a defendant who is before the court for sentence should be treated just as any other defendant based upon similar conduct, and I do not care whether or not it is a corporate defendant or a noncorporate defendant.

Senator METZENBAUM. Let me then ask you about another case in which you were deeply involved, because I think what is disturbing about your conduct, Mr. Jensen, is the fact that there were several cases in which there were great problems as far as the public were concerned, some loss of life, and strong urging by the other departments of government to go forward with prosecution in each case and they got off with a slap on the wrist or no prosecution at all.

In early 1985, the SmithKline & Beckman Corp. entered into a plea agreement with the Department pleading guilty to misdemeanor counts of failing to report to the FDA about serious adverse reactions to its high-blood pressure drug Selacryn. Three executives entered nolo contendere pleas to similar charges and were sentenced to perform 200 hours of community service.

After only 8 months on the market, Selacryn was linked to 36 deaths and more than 500 cases of liver and kidney damage. According to a Department of Justice fact sheet on the case, SmithKline had substantial medical evidence showing a direct link between Selacryn and liver damage overseas, but they went ahead with Selacryn in the United States anyway.

Over the following months, the company began to receive alarming reports from doctors around the country reporting hepatitis, delirium, coma, yes, and death as well. These reports were not submitted to the FDA by the company, as the law requires.

When FDA finally caught up with SmithKline, they found that the company knew of dozens of additional Selacryn users who were suffering adverse effects, including five who had died. Again, the Food and Drug Administration recommended felony charges against the corporation and the executives. You decided to plea bargain. Did you actually believe, as SmithKline officials claim, that the information on jury and death that should have been reported immediately had simply "dropped through the cracks," their language?

Mr. JENSEN. No; I do not agree with that.

Senator METZENBAUM. The Department stated they could find no motive for SmithKline's concealment of documents. What about the $80 million a year that SmithKline hoped to make selling that drug—is that enough of a motive?

Mr. JENSEN. It could have been enough of a motive. I do not know that——

Senator METZENBAUM. Pardon?

Mr. JENSEN. It could have been enough of a motive. I do not know, I do not recall the factual circumstances of that specifically.

Senator METZENBAUM. But were you responsible for making the decision not to prosecute?

Mr. JENSEN. I think I was a part of the decision. There was a decision to prosecute and to prosecute at a specific level, and I think that is what took place.

Senator METZENBAUM. You were part of the decision?

Mr. JENSEN. Yes.

Senator METZENBAUM. But again——

Mr. JENSEN. That is my recollection, Senator.

Senator METZENBAUM. Did you not tell me over the telephone when I said to you that Mr. Willard had failed to prosecute and how do you account for it? And didn't you say to me, "I accept the responsibility, it was my decision"?

Mr. JENSEN. It would be part of that participation in the decisionmaking process, yes.

Senator METZENBAUM. And did we not even have a conversation that, "Maybe I have to wait until you come up for confirmation at some point, if you are the one who made the decision"? You are saying you were a part of it. You told me over the phone that you made the decision.

Mr. JENSEN. I am certain that I did make whatever decision that I referred to. I do not recall specifically in terms of this context as to what decisions, but as far as the case, I did make decisions in the case. I do not recall anything about confirmation.

Senator METZENBAUM. You do not recall our conversation?

Mr. JENSEN. Well, I recall speaking with you. I do not recall any part of that that had something to do with confirmation.

Senator **Metzenbaum**. Well, I said it as a throw-away line.

Mr. **Jensen**. OK.

Senator **Metzenbaum**. And I said to you, because you were not appointed to anything at that point——

Mr. **Jensen**. I guess it was not an issue at the time.

Senator **Metzenbaum**. That is right, and Mr. Willard was involved and I said to you, "Well, then"——

Mr. **Jensen**. You have to wait——

Senator **Metzenbaum** [continuing]. You had told me so categorically that you made the decision——

Mr. **Jensen**. Right.

Senator **Metzenbaum** [continuing]. And I said, "I guess I have to wait until you are up for confirmation on something."

Mr. **Jensen**. Then today is the day.

Senator **Metzenbaum**. Today is the day.

Mr. Jensen, you also made the final prosecutorial decision in the *Eli Lilly Oraflex* case, did you not?

Mr. **Jensen**. I believe that I was a part of that participation. Whether or not that one was one where it was a final decision on my part or I was a part of simply ratifying the decisional process, I am not quite sure.

Senator **Metzenbaum**. Well, do you think that Mr. Willard or anybody else in the Department would have agreed to a fine of $25,000 after a company's arthritis drug, oraflex, had caused 26 deaths and 200 serious side effects in the United States, and a single Lilly official was allowed to plead no contest to a misdemeanor? Do you think that anybody in your department would have come to that conclusion without having cleared it with you?

Mr. **Jensen**. In terms of whether or not a plea was entered after a charge was filed, yes, there would be cases where—there is any number of cases where they are filed and then the disposition is made and it is not brought to my attention.

Senator **Metzenbaum**. But if this was an agreement for a $25,000 fine in connection with the case where the——

Mr. **Jensen**. I do not recall whether or not that was a part of the decisional process at that point. Obviously it was in terms of where the case finally was concluded. It may very well have been that there had been discussion about the fact that if charges were filed, that there would be a plea to be entered. I do not recall that specifically in that case.

Senator **Metzenbaum**. Well, let me read you your letter to the chairman: "I would like to provide some additional information concerning the Department of Justice handling of the prosecution of Eli Lilly & Co., which was the subject of my September 9, 1985 letter to you. This case was primarily developed by attorneys in the Office of Consumer Litigation of the Civil Division. Their recommendation presented to me by Acting Assistant Attorney General Willard was to prosecute Lilly and four of its officials for misdemeanor violations of the Food, Drug, and Cosmetic Act. In addition, I considered the views of the Food and Drug Administration and the U.S. attorney in resolving this matter. Based on my review of the evidence, I decided to charge only one individual, a physician and senior corporate executive with the most direct responsible relationship to the violations. As I have noted, I believe that this decision was a proper exercise of prosecutorial responsibility based upon the facts of the case. Because this information reflects upon individuals who were not charged, I would request this letter be kept confidential within the committee."

Now, is it a fact that you did make the decision?

Mr. JENSEN. Yes, but that has to do, as I say, with the threshold decision to charge or no charge. I do not recall whether or not there was any part of that at the time that there was an agreed upon disposition of the case. I do not believe that there was.

Senator METZENBAUM. Well, Mr. Jensen, did you know that Lilly met regularly with the Food and Drug Administration before the approval of oraflex. At those meetings, Lilly officials knew of a growing number of instances of adverse reactions and deaths related to oraflex reported by their British affiliate. They never reported that information to the Food and Drug Administration. The Justice Department drafted a fact sheet on this case which Lilly criticized because it was "clearly designed to create the impression that Lilly consciously disregarded medically significant information and withheld information from FDA."

Now, that fact sheet indicates intent. If there was intent, why were no felony charges filed?

Mr. JENSEN. The fact sheet indicates, whatever the fact sheets were in the total case, would be a part of the decision to go ahead and charge. As I pointed out in the letter, we did go ahead and charge based upon what appeared to be the relevant facts and circumstances, including issues that would have to do with intent.

Senator METZENBAUM. You only went forward with one misdemeanor charge against one individual, not any felony charge.

Mr. JENSEN. I believe that is correct.

Senator METZENBAUM. And yet your own department's fact sheet indicated that Lilly consciously disregarded medically significant information and withheld information from FDA. If they did that, that is a felony, is it not?

Mr. JENSEN. No; that is part of the elements of the criminal charge itself, the decision as to whether it should be a felony or misdemeanor would be a separate one, it would be dependent again upon the total facts and circumstances and the decision was that the appropriate charge would be as filed. As I recall, and I think as you correctly said, is a misdemeanor.

Senator METZENBAUM. Pardon?

Mr. JENSEN. I believe it was a misdemeanor level. I frankly do not recall that specifically, but I believe that the criminal charge was a misdemeanor.

Senator METZENBAUM. You charged them with a misdemeanor.

Mr. JENSEN. I believe so.

Senator METZENBAUM. And the fact that there were deaths involved, the fact it was intentional, the fact that they consciously disregarded the recommendation and the advice of the FDA, the fact that the company withheld information from FDA, and with all of that—you can talk about thresholds, but with all of that, you concluded to only charge one person with a misdemeanor.

Mr. JENSEN. Once again, that comes back to precisely what I said and what you mentioned, is that it is a matter that depends upon the facts and law and the available criminal charges that are there. There are not necessarily available criminal charges that would reach the total context. If there are deaths that are there, we are not in a position to bring homicide charges. There may be consequences that are, as I say, devastating, but we have to operate upon what is available in terms of our jurisdiction and in this instance our jurisdiction would make it available to bring the charges that we did.

Senator METZENBAUM. Well, you could have brought a felony charge on the basis of this——

Mr. JENSEN. I believe so. I believe that may have been one that was available and the decision once again would be one which is not one to say let us go light on this particular defendant, let us use some kind of leniency. That is not really what we are about. The question is where does it properly fit in the charging scheme. We would have filed anything that fit properly in the charging scheme. My decision would be that it fit at the level that we did file.

Senator METZENBAUM. Well, the fact did not bother you that Eli Lilly's chief executive officer admitted that he personally decided to launch the marketing of Oraflex, despite seeing a report that linked the drug to the deaths of five elderly women, the Lilly official who was responsible for reporting the adverse reactions to the FDA invoked the fifth amendment nearly 450 times when he was deposed—why were neither of these individuals charged?

Mr. JENSEN. Again, on the basis of fact and law.

Senator METZENBAUM. Staff attorneys in the Justice Department asked that four individuals be prosecuted in this case. You overruled them and charges were filed against only one officer. What made you reject the recommendations of your staff attorney? You say facts of law. Four of your staff people said go ahead and prosecute them.

Mr. JENSEN. In the great bulk of the decisions that have been brought to me that have had staff recommendations, I think that I have agreed with the staff recommendations and there have been occasions when I did not.

Senator METZENBAUM. I did not hear that.

Mr. JENSEN. Well, this is a question of whether or not you simply accept staff recommendations and go from there or whether you make an independent judgment. My responsibility is to make an independent judgment. As I said, in almost all the instances that I have had brought to me by staff lawyers, I have basically agreed. There have been some instances where I did not, and that would be one of those.

Senator METZENBAUM. And in each case where a major drug manufacturer was involved and people suffered, some died, some became seriously ill, some involved children, in each case you decided——

Mr. JENSEN. If you are suggesting, Senator, that I did this in some fashion not to be aware of that kind of consequence, that is not so. My responsibility is not, however, one that can be taken care of simply by being aware of those consequences and being devastated by them. It has to be one that is based upon the responsibility to bring or not to bring criminal charges.

Senator **Metzenbaum**. I am frank to say to you, Mr. Jensen, that I think you are going to be confirmed, but I must tell you that if I were a corporate official and I was involved in a matter where the health and safety of the public was concerned, I would try to do some jockeying around to get my case submitted to you because I think that you would be more lenient than a vast majority, the overwhelming majority of the judges in this country.

Mr. **Jensen**. Frankly, I——

Senator **Metzenbaum**. And I say that based upon the evidence, not based upon anything I know about you personally. But here are three cases that are egregious, there are three cases where there is loss of life, where there is willful acts, where there is willful withholding of information, where there are staff attorneys recommendation, where the FDA is making its recommendation, and with no exception.

Mr. **Jensen**. As you pointed out, these are matters of judgment, I have been making judgments about criminal cases for my entire professional life. I have never heard anyone really accuse me of being particularly lenient before.

Senator **Metzenabum**. I am.

Mr. **Jensen**. OK.

Senator **Metzenbaum**. Thank you, Mr. Chairman.

The **Chairman**. Senator Simon.

Senator **Simon**. Mr. Jensen.

The **Chairman**. I have two more nominees after this. I have got to leave here at 4 to conduct an Armed Services hearing.

Senator **Simon**. I will be brief.

The **Chairman**. I just want to make an inquiry and not rush you. Shall we take the other two nominees and come back and finish him, or will you only be a few minutes?

Senator **Simon**. I will be brief.

The **Chairman**. OK.

Senator **Simon**. The first question, in going through your background I see a strong background in criminal law. You will be confronted with constitutional questions, civil liberty questions. I do not find in just a hasty glancing through your record much background in that area. Do you wish to comment on that?

Mr. **Jensen**. It is true, Senator, that my background has been essentially in the prosecution of criminal cases. There have been some areas of my responsibility in the department or as a district attorney where I had civil responsibilities. I have dealt with any number of issues in terms of legislative formulation. I represented the District Attorneys Association of California in areas that dealt with the formulation of law within constitutional principles.

I recognize that my background has been principally criminal. I think it is fair to say that anyone who enters this task does it with humility about those areas where they have not had that kind of experience. I would intend to learn. There are some areas that I have familiarity with. There are other areas where clearly I do not. It would be my purpose to learn as much as I can. I think I am very sensitive to constitutional issues. That is a very real part of the prosecution kind of function, as you know, and I think that I have had a background that would show a great deal of sensitivity to that.

Senator SIMON. We have received communication from someone questioning your judgment in the *Inslaw* case. If you could simply send me a letter outlining what your involvement there was, we could enter that in the record. If we have any questions I will submit additional questions to you for the record in that case.

Mr. JENSEN. I could very briefly tell you.

Senator SIMON. Why do you not give me it briefly, yes.

Mr. JENSEN. The *Inslaw* case is a civil case in the department where Inslaw is a contractor with the department to develop an information system, the information system for U.S. attorneys called Promise. There were other instances where Inslaw has been a contractor to the department. The dispute happens to be over that one. There was a contract with the department to develop for U.S attorneys information systems. The judgment in terms of the persons responsible for handling the contract in the department was there had been a failure of performance. There was a dispute over that and it has finally led to litigation over that issue of performance on that contract, so there is a lawsuit there.

My relationship to that has been in the official duty as it comes before me as a part of decisions as to whether or not we would go forward with the notion that there had been a failure of performance. So I have had an official duty relationship to that case and that is simply all I can say about it.

Once again, everything that I have done with reference to that case has been as a matter of my professional judgment given to me as part of my responsibilities in the department.

Senator SIMON. Thank you. I may be submitted a few more questions to you in writing. I have no further questions, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Mr. Jensen, I just have two or three questions to propound to you. Would you tell the committee what procedures you will follow in determining any potential conflicts of interest and how you intend to resolve them?

Mr. JENSEN. Of course, there is a statutory structure and canons that apply to this; and my position in the Department of Justice is such that in a case where the United States as a party would raise that issue. If there were a case where I had to sign pleadings or authorizations, I would clearly be disqualified. If there were any issue about whether or not the file reflects that, I would intend to make sure by contact with the department whether or not that was in evidence and I would be disqualified, no question. If my relationship with cases was purely pro forma, that I had no personal participation, no personal knowledge, I would not be disqualified, I believe.

However, I think there is a distinctive area here where one should be concerned about the appearance of impartiality. I think that in any instance where there would be a reasonable question about the appearance of impartiality, I would recuse myself.

The CHAIRMAN. Mr. Jensen, would you please comment on the recent trend in the Supreme Court of those stricter requirements of standing?

Mr. JENSEN. This is the kind of an issue that requires constant attention. There is a constitutional principle that is involved in that the judicial power is one that is to be used only in those instances where there is a case of controversy before the Court and I think that is the issue in standing, and I think there are any number of issues that are current that are being considered by the Supreme Court where those issues are before the Court. In one sense this gets to that question you asked before about the proper role of the judiciary in maintaining its role, and it not to go beyond a case of controversy, although the Court might be interested in going beyond that where there is no proper constitutional standing in order to reach a decision that the Court would opt for or would like to reach. I do not think that is proper.

The CHAIRMAN. Mr. Jensen, in response to a portion of the committee questionnaire on judicial activism, you stated in part:

> There have been instances where courts in the face of perceived inaction by the legislature or the executive have solved the problem by judicial action when the problem is properly within the responsibility of another branch of government to decide whether or not any action at all is called for.

The question is do you feel that the Federal judiciary has any obligation to take corrective action when confronted with perceived inaction by another branch of government?

Mr. JENSEN. Not unless it is within their proper role. I think this gets to this whole notion in this discussion of judicial activism, is that there is a role. It may very well be that within the proper judicial role the decisions that are made have an impact or do reach areas that have been unattended to by legislative action. It may very well be that that takes place. But the real issue is whether or not the judicial decision is within the proper separation of powers role.

I may say that if I were going onto the appellate court, I would like to affirm the opinion of Judge Wilkins that he offered here before this committee on that same issue.

The CHAIRMAN. I think those are all the questions I have. I want to congratulate you on your appointment as a judge. I think you have done a good job in the Justice Department and I hope you enjoy your service. We will try to get your nomination up as soon as we can. Good luck to you in the future.

Mr. JENSEN. Thank you very much, Mr. Chairman. Thank you, Senator Simon.

The CHAIRMAN. Mr. Stiehl, will you come around?

Without objection, we will place Mr. Stiehl's résumé in the record.

TESTIMONY OF WILLIAM D. STIEHL, OF ILLINOIS, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF ILLINOIS

The CHAIRMAN. Mr. Stiehl, you have been a practicing attorney since 1949, I believe.

Mr. STIEHL. Yes, Mr. Chairman.

The CHAIRMAN. Now you have been nominated to be a U.S. District Judge for the Southern District of Illinois. Do you foresee any difficulties of transition from advocacy to impartial jurist?

Mr. STIEHL. No, sir, I do not.

The CHAIRMAN. Mr. Stiehl, I consider judicial temperament to be a prerequisite for a good Federal judge. Would you give me your thoughts on this subject? I have seen some Federal judges embarrass witnesses, embarrass lawyers, and embarrass other people in the court just unnecessarily, and they have got all the power in the world and I have often wondered why they did not use it with compassion and with reason.

Mr. STIEHL. I concur in your view, Mr. Chairman. It would be my practice as a judge if I am confirmed——

The CHAIRMAN. Please speak up so I can hear you.

Mr. STIEHL. It would be my practice if I were confirmed to treat everyone courteously, to conduct all hearings and trials in a fair and even-handed manner. That has been the way in which I have attempted to conduct my life. I can recall quite vividly as a young lawyer being in court and seeing judges on occasion not treat attorneys or litigants with courtesy and I found no excuse for that then and it would not happen in my court.

The CHAIRMAN. Do you have patience?

Mr. STIEHL. Yes, sir, I have had a lot of patience, particularly in this process. [Laughter.]

The CHAIRMAN. So you think you can be courteous to all the people around the courtroom?

Mr. STIEHL. Yes, sir, I think so.

The CHAIRMAN. The more power a man has, I think the more careful they ought to be not to abuse it. Now, Mr. Stiehl, one of the characteristics of judicial activism is said to include the tendency by the judiciary to impose itself upon other institutions in the manner of administrator with continuing oversight responsibilities. Would you give the committee your views on this criticism?

Mr. STIEHL. Yes, sir, Mr. Chairman. There are occasions, I am sure, when the conduct or the act of specific agencies come before a court requiring the court to give certain decisions. I think the court's only purpose and its only brief is to make those decisions, and not to attempt to run the agencies in the form the court would like them run, merely to insure that its orders are carried out.

The CHAIRMAN. Mr. Stiehl, another criticism of judicial activism is the tendency by the judiciary toward problem solving, rather than grievance resolution. Do you feel that this criticism is valid?

Mr. STIEHL. I think it is perhaps a valid criticism, Mr. Chairman. I think the courts should be and are limited by our system of government to resolving the question before them. The resolution of broader issues are quite properly, in my opinion, left to the Congress and the implementation to the Executive.

The CHAIRMAN. Mr. Stiehl, I congratulate you upon your appointment by the President and especially upon having the approval of both of your Senators, both of whom happen to be Democrats, a different party from yours and I think this speaks very highly of you and I hope you have a successful tenure on the bench.

Mr. STIEHL. Thank you, Mr. Chairman. I am very fortunate in that.

The CHAIRMAN. Senator Simon.

Senator SIMON. First, I just want to assure you, Mr. Chairman, that on the basis of everything I know, he is a man who will be courteous. I think he does have judicial temperament. How patient he is, his wife is here and maybe she is a better witness than he is on that, I do not know. But I think he will be a good judge.

One question, a minor question. In glancing through the material, I notice you are a member of the Missouri Athletic Club and it has been so long since I have been associated or been over there, do they discriminate in any way?

Mr. **Stiehl**. The Missouri Athletic Club's charter, as I understand it, permits——

The **Chairman**. Speak louder, please.

Mr. **Stiehl**. The membership is limited to male persons over the age of 20 years, as I understand it, Senator.

Senator **Simon**. The canon of ethics for a judge say it is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin, and traditionally nominees have been resigning from such organizations. This is a decision that you have to make, obviously, but for the nomination to go ahead I think it would be desirable for you to resign.

Mr. **Stiehl**. I, of course, am willing to do that if the committee feels that that is an indication of impropriety on my part. I had never felt that that was any evidence of discriminatory——

Senator **Simon**. It has been required of nominees in the past and I cannot very well ask for any other treatment for a nominee from my own territory. Beyond that, I have no questions, Mr. Chairman. I know you will be a good judge.

The **Chairman**. Thank you very much and I wish you well on the bench.

Mr. **Stiehl**. Thank you, Mr. Chairman and Senator Simon.

Our last nominee is John E. Conway. Mr. Conway, come around, please.

TESTIMONY OF JOHN E. CONWAY, OF NEW MEXICO, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF NEW MEXICO

The **Chairman**. Mr. Conway, do you want to introduce your family and friends you have here?

Mr. **Conway**. Yes, Mr. Chairman. Thank you very much. I have with me my wife, Karen.

The **Chairman**. We are glad to have you.

Mr. **Conway**. My mother, Evaline Conway, from Paola, KS; my sister, Anne Burlingane, from Tulsa, OK; a cousin, Ellen Linson, from the district here; a friend of our family, Maureen Rose, from the district; and Lt. Gen. and Mrs. Truman Spangrud, who—Gen. Spangrud and I flew together in the Air Force many years ago.

The **Chairman**. We are glad to have all of you here.

Now, I have just a few questions here, and I am going to have to finish here in 10 minutes. Mr. Conway, you have been a practicing attorney since 1963. From 1970 to 1980, you served as State senator in the New Mexico State Senate. Now you have been nominated to be a U.S. district judge for that District of New Mexico. With this background, do you believe that changes in the law should be reserved to the legislature whose members can be altered by the voters if the elected officials fail to reflect the values of society?

Mr. **Conway**. Absolutely, I do, Mr. Chairman. I think that I thoroughly understand the separation of powers, having served in the State senate. I have had occasion to have the New Mexico Supreme

Court misinterpret laws that I introduced and they substituted their judgment for mine and they are incorrect.

The CHAIRMAN. Mr. Conway, in reviewing your file I note that your trial experience has been exclusively civil in nature. Would you tell the committee what steps you have taken to prepare yourself for the criminal caseload that awaits you at the Federal district court level?

Mr. CONWAY. Yes, Mr. Chairman, I plan on reviewing all the videotapes that are made available through the Federal judicial center. Next week I go to school in Phoenix on criminal matters. I do not think I will have any problem whatsoever with criminal trials.

The CHAIRMAN. Mr. Conway, how does a responsible judge go about the process of interpreting seemingly open-ended constitutional provisions as the due process or equal protection clauses?

Mr. CONWAY. I do not think it is incumbent, Mr. Chairman, upon a trial judge to find a solution in the Constitution for every perceived wrong. I think that it is the trial judge's duty only to go as far as the Constitution does and not attempt to expand it.

The CHAIRMAN. Mr. Conway, are there ever any circumstances under which you would consider appropriate to decide a case on some basis other than where the intent of the framers of legislation or constitutional provisions can be detected either through the text of a provision or its surrounding legislative history?

Mr. CONWAY. Mr. Chairman, I think it would be my duty as a trial judge to go into the legislative history, to go into the constitutional history to seek the answer there and make the decision based on what I found there, rather than what I might personally want it to be.

The CHAIRMAN. I congratulate you upon your appointment by the President and also of having the endorsement of not only Senator Domenici, who I presume recommended you, but Senator Bingaman also. I understand that Congressman Lujan and Congressman Skeen approved also. I hope you have a successful service on the bench and I wish you well.

Mr. CONWAY. Thank you very much, Mr. Chairman.

The CHAIRMAN. We now stand adjourned.

[Whereupon, at 3:53 p.m., the committee adjourned, subject to the call of the Chair.]

BIOGRAPHIES

WILLIAM W. WILKINS, JR.

NOMINEE, U.S. CIRCUIT JUDGE, FOURTH DISTRICT

Birth: March 29, 1942. Anderson, South Carolina.

Legal Residence: South Carolina.

Marital Status: Married. Carolyn Louise Adams Wilkins, 3 children.

Education: 1960-1964—Davidson College, B.A. degree. 1964—1967—University of South Carolina, J.D. degree

Bar: 1967—South Carolina.

Military Service: 1967—1968—United States Army, Captain. 1969-1983—United States Army Reserve, Lieutenant Colonel. 1983-present—South Carolina National Guard, Colonel.

Experience: 1969-1970—Law Clerk to Hon. Clement F. Haynsworth, United States Court of Appeals, Fourth Circuit. 1970-1971—Legal Aide to Sen. Strom Thurmond & Legislative Counsel, U.S. Senate Antitrust and Monopolies Subcommittee. 1971-

1978—Wilkins, Wilkins, Nelson and Kittredge, Partner. 1971-1972—Assistant Circuit Solicitor, 13th Judicial Circuit (part-time). 1972—State Campaign Director, Reelect Senator Thurmond. 1973—present—Greenville Technical College, Legal Instructor (part-time). 1973-1974—Assistant County Solictor, Greenville County (part-time). 1974-1981—Solicitor 13th Judicial Circuit. 1981-present—United States District Judge, District of South Carolina. 1985-present—Chairman, U.S. Sentencing Commission.

KAREN LECRAFT HENDERSON

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF SOUTH CAROLINA

Birth: July 11, 1944. Oberlin, Ohio.

Legal Residence: South Carolina.

Marital Status: Married. Hoke F. Henderson, Jr.

Education: 1962-1966—Duke University, B.A. degree. 1966-1969—University of North Carolina, J.D. degree.

Bar: 1969—North Carolina. 1973—South Carolina.

Experience: 1969-1970—Wright & Henderson, Partner. 1971—Sole practitioner. 1972—Homemaker and Preparing for South Carolina Bar Exam. 1973-1982—Office of the Attorney General, State of South Carolina, Assistant Attorney General (1973-78.) Senior Assistant Attorney General & Director of Special Litigation Section (1978-82) Deputy Attorney General & Director of Criminal Div. (1982). 1983-present—Sinkler, Gibbs & Simons, P.A. Member.

D. LOWELL JENSEN

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF CALIFORNIA

Birth: June 3, 1928. Bringham City, Utah.

Legal Residence: Virginia.

Marital Status: Married. Barbara Jane Cowin Jensen, 3 children.

Education: 1945-1949—University of California, A.B. degree. 1959-1952—University of California, School of Law, LL.B. degree.

Bar: 1953—California.

Military Service: 1952-1954—United States Army, Corporal.

Experience: 1954—Sole practitioner, Oakland, California. 1955-1969—Assistant District Attorney, and Deputy District Attorney, Alameda County. 1981-present—U.S. Department of Justice, Assistant Attorney General, Criminal Division (1981-1983). Associate Attorney General (1983-1985). Deputy Attorney General (1985-present).

WILLIAM D. STIEHL

NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF ILLINOIS

Birth: December 3, 1925. Belleville, Illinois.

Legal Residence: Illinois.

Marital Status: Married. Celeste M. Sullivan Stiehl, 2 children.

Education: 1943-1945—University of North Carolina. U.S. Naval Midshipman's School, Columbia University. 1946-1949—St. Louis University, School of Law, LL.B. degree.

Bar: 1949—Missouri. 1950—Illinois.

Military Service: 1946-1950—United States Navy. 1953-1973—United States Naval Reserve, Commander (ret.).

Experience: 1950—Private practice. 1952-1971—Belleville, Illinois. 1956-1960—Assistant State's Attorney, St. Claire County, Illinois. 1970-1973—Special Assistant Attorney General, State of Illinois. 1971-1978—William D. Stiehl, Esq. 1978-1982—Stiehl & Hess. 1982-present—Stiehl & Stiehl.

JOHN E. CONWAY

NOMINE, U.S. DISTRICT JUDGE, DISTRICT OF NEW MEXICO

Birth: September 1, 1934. Joplin, Missouri.

Legal Residence: New Mexico.

Marital Status: Married. Karen Howard Conway, 3 children, 3 step-children.

Education: 1952-1956—United States Naval Academy, B.S. degree. 1960-1963—Washburn University, Law School. LL.B. degree.

Bar: 1963—Kansas. 1963—New Mexico.

Military Service: 1956-1960—United States Air Force, First Lieutenant, 1960-1970—U.S. Air Force Reserve, Captain.

Experience: 1963-1964—Matias A. Zamora, Esq., Associate. 1964-1967—Wilkinson and Durrett, Associate. 1966-1972—City Attorney, Alamagordo, New Mexico. 1967-1980—Durrett, Conway and Jordan (Firm had several names) Partner. 1970-1980—New Mexico State Senate, State Senator. 1980-present—Montgomery & Andrews, P.A., Shareholder.

CONFIRMATION HEARING ON CHARLES R. SIMPSON III

WEDNESDAY, JUNE 18, 1986

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 2:07 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Mitch McConnell (acting chairman) presiding.

Staff present: Duke Short, chief investigator.

OPENING STATEMENT OF SENATOR MITCH McCONNELL

Senator McConnell. The hearing will come to order.

Senator Thurmond is not coming today, and it is with particular personal pleasure that I preside over the hearing today on the President's nomination of Charles R. Simpson III, of Louisville, KY, to be the U.S. district judge for the western district of Kentucky.

I would like to ask Mr. Simpson to come forward now, if I may. Mr. Simpson, if you would raise your right hand, do you swear the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. Simpson. I do.

Senator McConnell. Please have a seat.

Mr. Simpson. Thank you, Mr. Chairman.

Senator McConnell. I might say at the outset that Chuck Simpson was proposed for the U.S. district court by a judicial commission, which is rather unique around this place.

Senator Ford and I have a bipartisan judicial commission made up of three appointees of each of us, and then three appointees of the Bar Association, who, in turn, forwarded to us five names of Kentucky lawyers they felt to be the most outstanding among numerous applicants that they had for the position.

Senator Ford and I, under the agreement we reached constituting the commission, thereupon simply forwarded those names to the administration. Chuck Simpson was selected by the President for this nomination.

I happen, by the way, as a personal matter, to be quite pleased about that, having known him for some 20 years and having observed his legal work firsthand when, in my previous position as county executive in Jefferson County, KY, I had occasion to hire lawyers and Chuck was one of our best during that period—I think, clearly, the best writer of any of the lawyers that I worked with during those 7 years in that position.

He also has extensive trial experience, which is totally relevant to the position of Federal district judge. I would also like at this point to insert two statements into the record, one of Senator Ford and one of myself, as well as an article by the Louisville Courier Journal which appeared Monday about Chuck Simpson's nomination, which, I might add, is quite favorable.

[The following was received for the record:]

PREPARED STATEMENT OF SENATOR WENDELL FORD

Mr. Chairman, I would like to lend my support to the nomination of Charles R. Simpson to be United States District Judge for the Western District of Kentucky.

The major reason I support Mr. Simpson's nomination is that he was recommended by the Federal Judicial Selection Commission of Kentucky. Originally, this Commission was created in 1976 by Senator Walter Huddleston and myself. Senator McConnell and I reestablished the Commission in 1985.

The Federal Judicial Selection Commission of Kentucky was started as an effort to ensure that partisanship does not intrude upon the judicial selection process. The design of the Commission works to assure that only those individuals who exhibit the highest personal and professional qualifications and attributes should be appointed to serve on the federal judiciary. I believe it has worked well.

Throughout an established procedure, the Commission reviewed twenty-five applicants and nominees for the position. The panel, consisting of nine knowledgeable and dedicated Kentuckians, examined the applicants' personal history, legal, and judicial experience. Personal interviews were conducted of ten persons by concerned Kentuckians regarding fitness and qualifications of the applicants and nominees. The Commission thoroughly examined all this information before it recommended Mr. Simpson and four other well qualified nominees. Senator McConnell and I sent those names to the White House and President Reagan chose Mr. Simpson to fill this vacancy.

I am proud to have helped recreate this Commission, along with my distinguished colleague, Senator McConnell, and the Kentucky Bar Association. I believe that it has served Kentucky well.

PREPARED STATEMENT OF SENATOR MITCH MCCONNELL

Mr. Chairman, I am proud to introduce to the committee today, on behalf of the administration and President Reagan, Charles R. Simpson III, to be United States district judge for the Western District of Kentucky. I have the honor of recommending Chuck's nomination to the committee without reservation.

Chuck Simpson's nomination is the product of the bipartisan Federal Judicial Selection Commission of Kentucky. I firmly believe that the maintenance of a strong and competent Federal judiciary is necessary for the protection of the rights and freedoms of all those under the jurisdiction of the U.S. Constitution and the preservation of the judiciary as a viable co-equal branch of our Democratic Government. The Kentucky Commission approach ensures that partisanship does not intrude upon the judicial selection process. As you may know, Mr. Chairman, this commission is comprised of nine members, three each appointed by myself, my distinguished colleague from Kentucky, Senator Ford, and by the board of governors of the Kentucky Bar. Chuck Simpson was one of five individuals recommended to President Reagan for nomination to the position of judge for the Western District of Kentucky. Chuck's nomination lends credit to the Kentucky judicial selection process. Chuck Simpson's professional qualifications speak for themselves, Mr. Chairman, and I would ask unanimous consent that Chuck's resume appear as part of the record; however, I will take a moment to summarize Chuck's accomplishments.

Chuck received a juris doctor degree from the University of Louisville Law School in 1970, and was selected for membership in the Omicron Delta Kappa honorary fraternity. Chuck also received a bachelor of arts degree in economics from University of Louisville, a time in which he was named to Who's Who Among Students in American Colleges and Universities.

Chuck Simpson has been engaged in the practice of law over the course of 15 years, and has gained substantial litigation experience. Chuck's practice has centered primarily on insurance defense litigation and bankruptcy practice before the United States Bankruptcy Court for the Western District of Kentucky. The remainder of his practice consists of commercial litigation, corporate, commercial real estate, divorce and minor criminal law. Mr. Chairman, I ask unanimous consent that a letter of recommendation from the Honorable Laurence E. Higgins, chief circuit judge for the Jefferson Circuit Court of the Commonwealth of Kentucky appear as part of the record.

I am pleased to be able to commend Chuck's abilities to the committee's attention from my personal knowledge. I had the pleasure of practicing law with Chuck in the Louisville firm of Levin, Yussman, McConnell & Simpson. In addition, Chuck served as personal counsel to me from 1978 to 1984 when I was the Jefferson County judge/executive. I found Chuck's performance at all times to be no less than outstanding.

Finally, I can personally commend Chuck Simpson to the committee as an individual. Mr. Chairman and fellow members of the committee, let me simply say that Chuck Simpson's personal and professional qualities ensure that he will be an outstanding member of the Federal bench.

Thank you, Mr. Chairman.

RESUME

CHARLES R. SIMPSON III
Attorney at Law
The Fourth Floor
717 West Main Street
Louisville, Kentucky 40202
(502) 585-3544

Tax Identification No. 61-0917477
Social Security No. 401-60-7238

PROFESSIONAL MEMBERSHIPS:

Louisville Bar Association
    Member: Board of Directors, 1981
Kentucky Bar Association
Bar Association of the United States District Court for the Western District of Kentucky
Bar Association of the United States Court of Appeals for the Sixth Circuit
American Bar Association
Defense Research Institute
American Trial Lawyers Association (Associate Member)

PROFESSIONAL EXPERIENCE:

1977 - present	Sole practitioner, firm of Charles R. Simpson III
1975 - 1977	Partner, Levin, Yussman, McConnell & Simpson, Louisville, Kentucky
1971 - 1975	Associate attorney, Rubin, Trautwein & Hays, Louisville, Kentucky

EXPERIENCE NARRATIVE:

I entered the practice of law in the spring of 1971 as an associate attorney with the firm of Rubin, Trautwein & Hays. I immediately began practicing in the area of insurance litigation. During my years with that firm, I continuously represented the firm's insurance clients in defense, subrogation, and policy construction matters involving both personal and commercial lines of insurance. My responsibilities were far-ranging, and included research, negotiation and trial work.

I left the firm in 1975 to begin practicing as a self-employed attorney in partnership with others. In 1977, the partnership was dissolved and since that time I have been a sole practitioner, although I have in association with me several other attorneys.

I handle a broad range of defense matters, including bodily injury, property damage, policy construction and interpretation, coverage questions, uninsured motorist and other claims under a wide variety of policy forms in both personal and commercial lines. I have had considerable experience in court room trial work in these matters, in addition to research, discovery and negotiation activity. I also handle subrogations.

I consider insurance law to be my area of specialty. I also practice bankruptcy litigation law as a sub-sepcialty.

EDUCATION:

1967 - 1970
University of Louisville
Law School
Louisville, Kentucky
Degree received:
Juris Doctor

Honors and activities:
- Omicron Delta Kappa Honorary Fraternity
- Phi Alpha Delta Law Fraternity
- Staff member: Louisville Lawyer

1963 - 1967
University of Louisville
Louisville, Kentucky
Degree received:
Bachelor of Arts
(Economics)

Honors and activities:
- Editor-in-chief of University newspaper
- Who's Who Among Students in American Colleges and Universities
- Student Council
- University Student Senate
- Lambda Chi Alpha Fraternity
- Omicron Delta Kappa Honorary Fraternity
- Pi Delta Epsilon Honorary Fraternity

1960 - 1963
Waggener High School
Louisville, Kentucky
Graduate diploma

Honors and activities:
- National Merit Scholarship finalist
- Various high school clubs

PERSONAL DATA:

Residence address: 3604 Basswood Lane
Louisville, Kentucky 40207

Residence Telephone: (502) 895-2620

Date of Birth: July 8, 1945

Family Status: Married, two children

Health: Excellent

APPROVED DEFENSE COUNSEL FOR:

Safeco Insurance Group
Commercial Union Insurance Group
Prudential Property and Casualty Insurance Company

LISTED:

Best's Directory of Recommended Insurance Attorneys

COMMONWEALTH OF KENTUCKY
JEFFERSON CIRCUIT COURT
OFFICE OF THE CHIEF CIRCUIT JUDGE

RECEIVED SEP - 6 1985

September 5, 1985

Federal Judicial Selection Commission
of Kentucky
c/o Kentucky Bar Association
West Main at Kentucky River
Frankfort, Kentucky 40601

Gentlemen,

I have been apprised of the request by the Honorable Charles Simpson, a member of the Kentucky Bar, that he be considered by the Federal Judicial Selection Commission of Kentucky for the judicial vacancy existing in the United States District Court, Western District of Kentucky.

Mr. Simpson is well-known to me as a practicing attorney at the Jefferson County Bar. He is a highly competent trial lawyer, and an extremely articulate, forceful and adept advocate. His impeccable manners in Court manifest a deep regard and respect for the judiciary. His kindness, courtesy and consideration which he exhibits towards the Court, court personnel, opposing counsel, and the parties and witnesses on both sides is remarkable and ever-present.

It is my feeling that Mr. Simpson is truly worthy of the Commission's most serious consideration.

Respectfully yours,

Lawrence E. Higgins

LEH/sjsj

[From the Courier-Journal, June 16, 1986]

Republican Charles R. Simpson III will become a federal district judge for Western Kentucky if the Senate approves his nomination. He was nominated by President Reagan June 6.

FEDERAL JUDGE NOMINEE IS GIVEN HIGH MARKS BY FRIENDS, COLLEAGUES

(By Alan Judd)

Chuck Simpson was the classic Young Republican.

A fraternity man at the University of Louisville in the mid-1960s, Simpson was Lambda Chi Alpha's token Republican, says his friend and fraternity brother Geoff Morris.

As editor of the student newspaper, The Cardinal, Simpson became interested in campus politics, and watched as his fraternity's political combine battled rival Phi Kappa Tau, headed by Mitch McConnell, now Kentucky's junior senator.

Simpson also worked in the Young Republican organization for Marlow Cook and William Cowger in their congressional campaigns, according to friend Bill Warner.

Throughout all that, however, Simpson never developed a strong political ideology, friends say. He is a Republican and a conservative, but maintains an open mind and a sense of fairness, they say.

Those qualities, his friends and some fellow lawyers say, will serve Charles R. Simpson III well if the Senate confirms his nomination to be a federal district judge for Western Kentucky, based in Louisville.

"He is not a rigid adherent of any particular political philosophy that I know of," said Warner, who has known Simpson for about 20 years. "He's a Republican, but I don't think he has any hard and fast ideological biases. . . . If he did, I guarantee you that he would not carry those into the job."

U.S. Bankruptcy Judge Merritt Deitz, a friend for 10 years, said that as a judge Simpson will display "strict conformity with the law as he perceives it. He tends to treat the law as it is and not as it should be."

A few lawyers who frequently try civil and criminal cases in federal court questioned, however, whether Simpson has the proper experience to qualify as a federal judge.

They said in interviews last week that they know little about his law practice and have never heard of his trying a case in federal court.

Criminal defense lawyer Thomas Clay, for example, said, that "with the complexity of the issues that are presented every day in federal court, it would certainly be helpful . . . to have someone with judicial experience."

Lawyer Marvin Coan, who has shared office space with Simpson since 1978, said that Simpson has plenty of courtroom experience in civil cases, but has seldom represented defendants in criminal trials.

Morris, now a criminal defense attorney, said Simpson's limited criminal-law experience could be a plus.

"A lot of judges come from a prosecutorial background," Morris said, "but he would not be predisposed to rule in any way. He'd be listening and looking at the law."

President Reagan nominated Simpson, 40, on June 6, after a selection commission set up by McConnell and Sen. Wendell Ford recommended five applicants. The others were John David Cole of Bowling Green, William R. Patterson Jr. of Louisville, Hopkins Circuit Judge Thomas Butler Spain of Madisonville, and George S. Wilson III of Owensboro—all Democrats.

"It was certainly to Chuck's advantage that he ended up being the only Republican," McConnell said, because the majority of Reagan's judicial nominees have been Republicans.

R.J. Turkey, a Lexington lawyer who chaired the selection commission, declined to say what qualified Simpson.

About 25 lawyers applied for the $78,700-a-year post, Turkey said, and the commission interviewed 10 before submitting the five finalists' names to Reagan.

After Reagan selected Simpson, the American Bar Assoication Investigated his credentials, but their ranking of him will remain confidential until the Senate Judiciary Committee holds a hearing on whether to recommend confirmation of his nomination, committee spokeswoman Jenny Wilcox said. That hearing will not be held for at least three weeks, she said.

Simpson declined an interview, saying he thought it would be inappropriate until after his confirmation-hearing.

Several friends and lawyers who know him spoke highly of his legal knowledge during interviews last week, however.

Ted Mussier, who has been Simpson's opponent in several suits, said: "In my dealings with him, even given the adversarial situation, he was pleasant to work with. I have nothing but high marks for Chuck. I think he'll be a good federal judge.

"Reagan surprised me with this one," Mussler said.

Simpson is perceived by other Louisville lawyers as "a fair and competent, attorney," said Rebecca Westerfield, president of the Louisville Bar Association.

Coan called Simpson "truly one of the brightest fellows as a lawyer that I've met."

"He's intellectually very, very keen" Coan said, "He's a pretty quick study on things."

McConnell said, "Of all the lawyers I've dealt with, he's the best writer of any of them, really a skillful lawyer.

"Cogent thinking, clear analysis, good writing ability are qualities particularly valuable to a judge," he said. "Those are the qualities he's so strong in."

Simpson took several months off after law school to go to Europe and then returned to his native Louisville to become a partner in a law firm with McConnell 14 years ago. That firm later disbanded, and Simpson now practices alone although he shares office space with Coan.

Simpson was appointed in 1975 to be one of 11 trustees in U.S. Bankruptcy Court for Kentucky's Western District Trustees collect the assists of individuals and companies that declare bankruptcy and arrange for their sale to maximize the return to unsecured creditors.

Simpson and Deitz were involved in a controversy in 1978 concerning trustee fees. The Louisville Times reported that Deitz turned over to Simpson about 100 cases that he had begun working on before being appointed a bankruptcy judge. Simpson acknowledged that he had done no work on the cases and had passed about $3,000 in fees back to Deitz.

Three federal judges asked then-U.S. Attorney Albert Jones to investigate, but Jones said last week that "we found that there was no violation of any federal law. There was no chicanery involved in the thing. That ended it."

As Jefferson County judge-executive, McConnell hired his former law partner to represent him on several matters, including contract negotiations with county police officers.

Former Jefferson County Attorney J. Bruce Miller said that Simpson had a good professional relationship with lawyers in his office.

"I don't recall any particular stumbling blocks at all," Miller, a Democrat, said, "Obviously we were of opposite parties, but I don't recall, an incident where that ever came into play."

Simpson's private practice has consisted primarily of representing insurance companies in litigation with policyholders, Coan said. That involves a lot of litigation in state and federal court, he said.

Jefferson Circuit Judge Laurence Higgins, who has presided over several trials involving Simpson, said that Simpson is "one of the most professional lawyers who has appeared before me."

"He thoroughly prepares all of the cases," Higgins said, "He is current with the law applicable to the situation, and he is a perfect gentleman. . . . He's as good a lawyer as I know."

Simpson's temperament suits a judge, Higgins said. "He is a very patient individual. He never raises his voice in anger. He is always pleasant in advancing an argument no matter how forceful he gets, he is very pleasant about it."

Warner said that Simpson, who lives on Basswood Lane in Rolling Fields with his wife, Clare, and their two children, is "a fun guy to be around."

"He's very bright," Warner said. "He's got a marvelous sense of humor. I can't think of two or three times I've seen him flapped about anything. He's got a very even temper.

"He's a stand-up guy in a lot of ways, "Warner said. "He has been for me."

Senator McCONNELL. I would ask Chuck if he would introduce the members of his family who are here. I see that there are quite a few of them.

TESTIMONY OF CHARLES R. SIMPSON III, OF KENTUCKY, TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF KENTUCKY

Mr. SIMPSON. Thank you, Mr. Chairman. First of all, I would like to introduce my wife, Clare; my son, Charlie; my daughter, Pamela; and also my mother and father, Mr. and Mrs. C.R. Simpson, who are also from Louisville, KY.

Senator MCCONNELL. Well, we are glad to have all the family members here, and we know you are proud of this nomination and Chuck's achievement. He would have been on the front page, but the President chose to nominate a new Chief Justice of the Supreme Court, and that just kind of pushed it right off.

The chairman has several questions. He usually is the principal questioner in these hearings, and on his behalf I will ask you the following questions.

You have been a practicing attorney since 1971. Since 1975, you have been a member of a panel of bankruptcy trustees in the Western District of Kentucky. I believe your appointment to this panel was made by the Director of the Administrative Office of the U.S. Courts.

From 1978 to 1984, you served as personal counsel to the county judge executive, where you were involved in municipal and governmental law and the drafting of legislation and labor negotiations.

Do you believe this experience has prepared you for the challenging task that lies ahead as a U.S. district court judge, and if so, how?

Mr. SIMPSON. Yes; I do, Mr. Chairman. I have had extensive litigation experience, as you pointed out.

Senator MCCONNELL. Will you pull that a little closer to you?

Mr. SIMPSON. I certainly will.

I responded by saying, yes, I do, Mr. Chairman. I have had extensive litigation experience in my career, and I think that that will serve me well in this position, should I be confirmed by the Senate.

Senator MCCONNELL. At his nomination hearing last week concerning his appointment to the Fourth Circuit Court of Appeals, Judge William Wilkins testified that the United States Sentencing Commission, of which he is chairman, is drafting sentencing guidelines that "will have a dramatic impact on the Federal judiciary," and that "the guidelines will be well received by the Congress and the American people."

Do you feel it will be beneficial to you, once you are confirmed as a Federal district judge, to have sentencing guidelines?

Mr. SIMPSON. Yes; I do, Mr. Chairman. I am told by judges that the duty of sentencing is one of the most lonely tasks of a judge, and as long as there is built in some flexibility for the court, I think that sentencing guidelines would be of assistance.

Senator MCCONNELL. In reviewing your file, I noted that 99 percent of your litigation experience has been civil in nature. Do you feel that your lack of criminal trial experience will in any way hinder you in the performance of your duties as a U.S. district judge?

Mr. SIMPSON. Mr. Chairman, I do not feel that it will. I have had some criminal experience, although not a great deal, and so I am not exactly a neophyte in that area. I believe that the transition will be fairly easy to criminal law because I have been in litigation all of my professional career.

I would like you to know that I have taken some steps to familiarize myself with criminal procedure. I have attended several legal education seminars in which Federal criminal procedure was one of the topics, and I believe that the education process in that area will enable me to carry out those duties without any problem.

Senator McConnell. Thomas Jefferson remarked shortly after the ratification of the Constitution that our Nation's particular security is the possession of a written Constitution. "Let us not make it a blank paper by construction."

What do you think Jefferson meant by that warning, "Let us not make it a blank paper by construction?"

Mr. Simpson. Mr. Chairman, Mr. Jefferson was a very wise man, and I think that he had in mind that the Constitution was a document that was written by the Framers for all time and for all ages, and that it should not be changed by judicial decisions.

Senator McConnell. In response to a portion of the committee questionnaire concerning judicial activism, you stated, in part,

> The courts were not created and are not equipped to remedy every wrong, nor were they created to override the legitimate policy decisions of the Legislative and Executive Branches of government. The courts must be careful to remain cognizant of their proper role within our Federal system.

What, in your opinion, is the proper role of the Federal judiciary?

Mr. Simpson. Mr. Chairman, I believe very strongly in the separation of powers. I believe that the function of the courts is to find the law and apply it, and that it is left to the other branches of law to set the policy and make the law.

Senator McConnell. That completes the questions that the chairman has. I also want to insert in the record Mr. Simpson's biography, which is the final insertion.

Knowing the nominee as I do, I have no additional questions to ask, other than to extend my heartiest congratulations upon your nomination by the President. It is a marvelous opportunity for public service and I know that you will be an outstanding federal judge.

Mr. Simpson. Thank you very much, Mr. Chairman.

Senator McConnell. Senator Simon is apparently on his way and we will await his arrival.

[Pause.]

Senator McConnell. Senator Simon's staff member has indicated to me the question he was going to ask you, which was the matter of your membership in a private club that may discriminate either on the basis of race or sex and your views about whether or not you would be willing to resign from that club.

It is a question he has asked every nominee I can recall having before us.

Mr. Simpson. I understand that that is Senator Simon's request, and the answer is yes, I am willing to resign.

Senator McConnell. You would be willing to resign?

Mr. Simpson. Yes, Mr. Chairman.

Senator McConnell. Are there any other questions that you would like for me to ask on behalf of Senator Simon?

STAFF. No.

Senator McCONNELL. OK. I think I am now safe to say that the hearing is adjourned. Thank you for coming.

Mr. SIMPSON. Thank you, Mr. Chairman.

[Whereupon, at 2:24 p.m., the committee was adjourned.]

BIOGRAPHY

CHARLES R. SIMPSON III

NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF KENTUCKY

Birth: July 8, 1945. Cleveland, Ohio.

Legal Residence: Kentucky.

Marital Status: Married. Clare Frederick Cummings Simpson, 2 children.

Education: 1963-1967—University of Louisville, B.A. degree. 1967-1970—University of Louisville, J.D. degree.

Bar: 1970—Kentucky.

Experience: 1971-1975—Rubin, Trautwein & Hays, Associate. 1975-1977—Levin, Yussman, McConnell & Simpson, Partner. 1977-present—Private practice. 1978-1984—Staff Counsel to Jefferson County Judge/Executive (part-time).

CONFIRMATION HEARING ON ARNOLD I. BURNS

WEDNESDAY, JUNE 25, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 1:30 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Staff present: Duke Short, chief investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

We are meeting today to consider the nomination of Arnold I. Burns, of New York to be Deputy Attorney General of the United States, vice L. Lowell Jensen, resigning.

Mr. Burns, we are very pleased to have you with us, and Senator D'Amato, your able, distinguished and dedicated Senator from New York, is here to speak in your behalf and we would be glad to hear from him.

STATEMENT OF HON. ALFONSE D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator D'AMATO. Well, thank you very much, Mr. Chairman. I am pleased to have the opportunity once again to present Arnold Burns to you and to this committee. As you recall, less than 7 months ago, on December 4, 1985, I was honored to present Mr. Burns to this committee as the President's nominee to be Associate Attorney General

At that time, Mr Chairman, I said that those who worked with Arnold Burns described him as a dynamic and compassionate person who gets the most difficult jobs done. I am pleased to say that those words are still true, and that the only difference with Arnold Burns today is that he has more experience and more people know him and respect him.

Mr. Chairman, he has very ably supervised the five litigation divisions of the Justice Department, the U.S Trustees Program, and the Foreign Claims Settlement Commission.

He has been so effective that President Reagan has submitted his name to the Senate as his nominee to become the new Deputy Attorney General. He has continued to be active as chairman of the board of directors of Freedom Foundation at Valley Forge and as a member of the board of directors and vice president of the Boys Clubs of America, to name only two of the organizations that have benefited from his exceptional dedication that he continues in his important post.

By his excellent performance as Associate Attorney General, Arnold Burns has proven himself highly qualified for the position of Deputy Attorney General. Mr. Chirman, it gives me great pleasure to present to you once again, as the President's choice this time to be Deputy Attorney General, a man that the dean of Cornell Law School described as, and I quote, "an individual of great human strength, great compassion and great warmth."

Mr. Chairman, Arnold Burns has become respected by so many as they have come to see him in action and the good work he has done. I commend him to this committee and I know that you have been impressed with his stewardship and with his work as Associate Attorney General, and I know he will enjoy the strong support of the chairman and of the committee, and that the rest of the Senate will follow your lead, Mr. Chairman.

So it is good to be here with Arnold Burns. He promises me that it will not happen again. I am not so sure. I told him, do not make those promises because the President may have something else in mind for you. So, do not be so quick to say this is the last time.

Thank you, Mr. Chairman.

The CHAIRMAN. Well, thank you very much, Senator D'Amato. We appreciate your taking time to come here in person and endorsing Mr. Burns in such fine style. Now, I understand that Senator Moynihan is on the floor and cannot be here, but that he also endorses him.

We are pleased to have you, Senator D'Amato. You can stay longer if you want to. If not, we will understand the situation and how busy you are, because you are a busy man; I know that.

Senator D'AMATO. Thank you.

[Prepared statement of Senator Moynihan follows:]

PREPARED STATEMENT OF SENATOR DANIEL PATRICK MOYNIHAN

Mr. Chairman, in December, it was my pleasure to introduce Mr. Arnold Burns during his confirmation hearing for Associate Attorney General. I spoke then of Mr. Burns's legal talents, vigor, and his contribution to the New York State community. So I am not surprised to be back again today, this time to support Arnold Burns as a candidate for Deputy Attorney General.

The Deputy Attorney General is responsible for the day to day operation of the Justice Department, long term budget planning, and the Department's five civil litigation divisions. This is no small order, but I am confident Mr. Burns is prepared to meet this next demanding assignment in a distinguished legal career. That he served on the Management Committee of Burns, Summit, Rovins, and Feldesman, and on numerous noteworthy boards, will serve him well, if confirmed.

Mr. Burns's commitment to New York State, and in a broader context, his involvement in those communities in which he lives is appreciated by the senior Senator from New York, and I thank him. I trust this man of energy and animation will continue a credit to New York and the Department of Justice.

The CHAIRMAN. Now, Mr. Burns, if you will just raise your hand and take the oath, will the evidence you give in this hearing be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. BURNS. It will, sir.

The CHAIRMAN. Thank you. Have a seat. Would you like to introduce your family who are here, or friends?

TESTIMONY OF ARNOLD I. BURNS, OF NEW YORK, TO BE DEPUTY ATTORNEY GENERAL OF THE UNITED STATES

Mr. BURNS. Thank you very much, Senator. First of all, I would like to introduce my wife and partner, Felice Burns.

The CHAIRMAN. Ms. Burns, we are delighted to have you with us.

Mr. BURNS. Just the other day, we celebrated our 35th wedding anniversary.

I have with me my nephew, Stephen Salem. I have got my staff here, my deputies, Randy Levine and John Harrison and Lee Liberman and Greg Walden. I am not going to prolong this by naming others, but thank you for the opportunity of introducing them.

The CHAIRMAN. Thank you very much. We are glad to have all you people here.

Mr. Burns, I just have a few questions and we will move right on and try not to keep you but a few minutes.

Mr. Burns, I would like to welcome you back before the committee today. You appeared before the Judiciary Committee on December 4, 1985, when you were nominated to be Associate Attorney General. Now, the President has nominated you to be the Deputy Attorney General.

Would you tell the committee what you feel would be the most satisfying aspect of serving in this capacity?

Mr. BURNS. Mr. Chairman, I am looking forward to helping the Attorney General as his right arm to provide leadership to the Department of Justice. Under his direction, we expect that—I look forward to tightening the management of the Department in an environment today of fiscal constraints.

It is our intention to get the maximum value for every dollar that we spend in the Department. I am looking forward—and one of the satisfying things for me will be to help provide, with him, to the Department experience and balance and perspective and judgment borne of experience.

I am looking forward to helping him with long-range planning, as well as day-to-day operations and day-to-day decisionmaking.

The CHAIRMAN. Thank you very much.

Mr. Burns, traditionally, the Deputy Attorney General has been responsible for oversight of the day-to-day operations of the Department of Justice. Would you tell the committee what your new duties will be under the Attorney General, and have you, in fact, discussed this matter with Attorney General Meese?

Mr. BURNS. Mr. Chairman, in my new role I shall continue to be responsible for the five civil litigating divisions of the Department of Justice, the Foreign Claims Settlement Commission, and the United States Bankruptcy Trustee Program.

In addition, I will chair the Departmental Resources Board, which is charged with the responsibility of long-range policy planning, long-range program planning, long-range fiscal planning.

I have had some general conversations with the Attorney General along these lines, but we have promised each other that if the Senate sees fit to confirm me that immediately thereafter he and I will sit down and talk turkey and roll up our sleeves and get down to specifics. We have not done that yet.

The CHAIRMAN. Mr. Burns, as the new Deputy Attorney General, you will maintain responsibility over the five civil litigating divisions of the Department. Are the resources of these divisions sufficient to handle the broad and varied areas of litigation in which they are involved?

Mr. BURNS. The civil litigating divisions, Mr. Chairman, at the moment are handling roughly 205,000 cases, with potential liability of over $5 billion. I am happy to tell you that for every dollar spent in litigating on the civil side, we get a return many-fold. So a dollar spent is a dollar well spent.

So, while we can continue to use additional resources and can put them to very effective and cost-productive use, we are doing the job now and we are quite prepared to continue to do it even though we may be in an environment of fiscal constraint.

The CHAIRMAN. Mr. Burns, would you tell the committee what your major contributions have been as Associate Attorney General and what long-range goals, if any, you have established as you prepare to serve in the position of Deputy Attorney General?

Mr. BURNS. Well, taking the first part of the question first, I think that as Associate Attorney General, I have tried to provide the Attorney General of the United States with that which I think he was looking for; namely, a fresh, new look from a new and different perspective.

I came to Government service, Mr. Chairman, really for the first time. I came from the active practice of private law. I spent 32 years in the practice of law handling a variety of different kinds of matters and managing what ultimately became a fairly substantial law firm.

So I think that in my job as Associate Attorney General, I have provided the Attorney General with the factor of experience, the ability to provide direction, the ability to provide management, the ability to make day-to-day decisions and to make recommendations to him with regard to decisionmaking.

And in short, I have provided, one might say gray hair, but probably more accurately a lack of hair to the process.

The CHAIRMAN. Mr. Burns, I wonder if you have any thoughts on minimizing the number of frivolous claims against the Government which are brought before the courts.

Mr. BURNS. Before I get to that, I did not fully respond to your prior question I just want to say that in terms of long-range goals, it is the Attorney General's objective, and mine to help him and to be a resource for him, to improve the efficiency and the management of the Department, to better coordinate our civil and criminal litigation activities, and to better coordinate between main Justice and our frontline troops out there in the U.S. Attorneys' Offices, to better coordinate the law enforcement components of the Justice Department, such as FBI and DEA, and to continue a good and winning fight against the scourge in this country that we have through drugs and terrorism and espionage and fraud and economic crime, and so forth, and to continue to protect the public treasury and to maximize the dollars coming into the treasury by reason of our litigation activities

With respect to your question on frivolity of claims, at the beginning of this month I had the privilege of addressing a class at the Hofstra Law School, the commencement class.

I mentioned to those young lawyers just starting that they were indeed officers of the court and that in this environment where our courts are having difficulty because of overburdened dockets, because of an enormous increase in litigation, in handling the administration of justice there was no place for the frivolous claim; there is no place for the specious argument, no place for the procedural gimmick and no place for the dilatory tactic.

So, part of my answer to you is that we have got to teach our lawyers in this country to exercise lawyer restraint. To back that up, I think that we have got to impose sanctions on lawyers who do not play the game honorably and fairly.

I told those young people that the only way to be a success in the practice of law is to play the game that way with honor and integrity. I also think that we have got to have sanctions. We have got to heighten the awareness of the bar to entertain disciplinary proceedings, where appropriate.

And I think that we can use our ingenuity to devise procedural devices where, for example, if you were to offer to stipulate a fact with an opposing lawyer and he fails to stipulate, you charge him with the costs. If you offer a dollar settlement and he refuses to accept it and puts you to the burden of proof and he does not do any better, then the adversary pays for the cost of proving it.

We have got to direct our attention to solving this problem of burdening our courts with nonsense.

The CHAIRMAN. Mr. Burns, at your December 4, 1985, hearing, you were asked to comment on efforts to transfer litigation authority to other agencies and departments. I believe you responded at that time in these words: "That, to me, requires systematic coordination, and I think that is one of the principal roles of the Department of Justice to do that job and to control the litigation of the United States. I think it is very important that it be centralized in the Justice Department."

Now, Mr. Burns, now that you have been with the Department of Justice for a time, do you have any new thoughts on this subject?

Mr. BURNS. Well, the answer that I gave when last we discussed the point, Mr. Chairman, was, I guess, based on instinct and common sense. And now that I have been in the Department for 6 months, there is no doubt that I was on the right track.

I am more convinced than ever that it is vitally important that we centralize all of the litigating functions in the Justice Department, again, to avoid going off in different directions on different litigating courses. And I think this is an area where we really must continue to focus attention in the Department for leadership of the U.S. litigating effort.

The CHAIRMAN. Mr. Burns, will you respond to requests to appear and testify before any duly constituted committee of the Senate?

Mr. BURNS. I certainly shall, Mr. Chairman.

The CHAIRMAN. Mr. Burns, I want to congratulate you on your appointment by the President, and I want to commend Attorney

General Meese, who is doing an excellent job, in recommending you to him.

I want to also thank you for the outstanding job you have been doing in the Justice Department, and tell you that our country is fortunate to have people like you in public service.

I do not anticipate any opposition to your appointment by the Senate I feel that you will be confirmed promptly, and I wish you much success and much happiness in your new position.

Mr. BURNS. Mr. Chairman, thank you so much for your kindness and your generosity, and I want to also thank the members of your staff for the very many courtesies that have been extended to me. I am very appreciative and very humble.

The CHAIRMAN. We have placed your name on the agenda for action tomorrow, and unless some objection is brought somewhere to prevent action, I hope we can get approval tomorrow and then report you to the Senate.

Thank you very much.

Mr. BURNS. Thank you, sir.

The CHAIRMAN. We stand adjourned.

[Whereupon, at 1:47 p.m., the committee was adjourned.]

BIOGRAPHY

ARNOLD I. BURNS

NOMINEE, DEPUTY ATTORNEY GENERAL

Birth: April 14, 1930, Brooklyn, New York.

Legal Residence: New York.

Marital Status: Married, Felice B. Burns, 2 children.

Education: 1947-1950—Union College, B.A. Degree, 1948 (summer)—Columbia University; 1950-1953—Cornell University, School of Law, LL.B. Degree.

Bar: 1953—New York.

Military Service: 1953-1957—United States Army, Judge Advocate General's Corps.

Experience: 1/1986-Present—Department of Justice, Associate Attorney General, 1960-1986—Burns, Summit, Rovins and Feldsman, Partner; 1957-1960—Dewey, Ballantine, Bushby, Palmer and Wood, Associate.

CONFIRMATION HEARINGS ON: JOEL F. DUBINA, ALAN C. KAY, RICHARD B. McQUADE, JR., STEPHEN SPANGLER TROTT, AND WILLIAM F. WELD

WEDNESDAY, AUGUST 13, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 1:55 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Heflin, McConnell, Metzenbaum, Simon, Broyhill, Denton, Grassley, and Kennedy.

Staff present: Duke Short, chief investigator; and Jack Mitchell, investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. It is 5 minutes till 2 but we have got one of the nominees here and we can go ahead, if the Senator is here. Where is Senator Metzenbaum?

[Pause.]

The CHAIRMAN. The committee will come to order.

We have a number of judges to be considered today, and two Assistant Attorney Generals, I believe.

The first we have is Richard B. McQuade, Jr., of Ohio. I see we have the two distinguished Senators from Ohio here. We would be pleased to hear from them.

Senator METZENBAUM. Congressman Latta is here.

The CHAIRMAN. Yes. And I call on him, too.

The senior Senator, I believe, Senator Metzenbaum.

STATEMENT OF HON. HOWARD M. METZENBAUM, A U.S. SENATOR FROM THE STATE OF OHIO

Senator METZENBAUM. Thank you, Mr. Chairman.

Mr. Chairman, I am very happy to be here on behalf of this nominee today. He has a very distinguished legal background. I have spoken with many of the lawyers in the Lucas County area of Toledo, and with no exception, all of them give him a very high and favorable recommendation.

I believe that he is the kind of individual that particularly belongs on the district court, and my colleague is here with me, and the Congressman from that area is here with me, and I strongly recommend him to you for confirmation. And I want to say to you, Mr. Chairman, that I know that he is good, and able, because not only all the Democratic politicians called me in connection with this confirmation, but all the Republican ones did as well, and anybody who has that much bipartisan support cannot be all bad, so I do hope you will see fit to confirm him.

The CHAIRMAN. Thank you very much. Senator Glenn.

STATEMENT OF HON. JOHN GLENN, A U.S. SENATOR FROM THE STATE OF OHIO

Senator GLENN. Thank you very much, Mr. Chairman.

I am very pleased to be here to also help introduce to the members of the Judiciary Committee, Judge Richard B. McQuade, Jr.

We are also honored today to have Mrs. McQuade with us. Mrs. McQuade, would you stand so everybody can see you.

Judge McQuade has been a highly respected member of the Ohio Bar since 1966. He has served his community in private practice, and as a prosecuting attorney, and on the bench of the Sixth District Court of Appeals.

In his current capacity as Fulton County Common Pleas Court judge, Mr. McQuade has earned the respect of his colleagues, and the community.

In fact he has received the support of nine county bar associations, and the city of Toledo Bar Association in northern Ohio.

Mr. McQuade has received numerous awards for his work on the bench including the Ohio Supreme Court superior judicial service award, and its excellent judicial service award.

He has also contributed articles to Judicial Notice magazine, the Handbook For Prosecuting Attorneys, and the new Ohio criminal code, and he has lectured on a wide range of legal topics. This is further evidence of Judge McQuade's superior qualifications to be a U.S. district court judge.

I believe Mr. McQuade possesses the temperament and integrity needed to make an excellent Federal judge. His commitment to providing the poor and disadvantaged with competent legal assistance is well documented.

As a judge, he has frequently referred parties without representation to the local pro bono program, and, as a matter of conscience, will not resolve a criminal matter without legal representation for the defendant.

Mr. Chairman, Judge McQuade is the type of judicial candidate we would all like to see more of, and as Senator Metzenbaum said, I, too, called a number of people in northwest Ohio, people I know and trust, whose judgment I respect, and there have been no bad things said about Judge McQuade.

He is an excellent representative of his community and of our State, and I hope the members of the committee will approve his nomination for the U.S. district court judge for the northern district of Ohio.

I would also hope, Mr. Chairman, that with the backlog of cases we have up there, some 500 cases, that it might be possible to waive the 3-week waiting period, and maybe we could get this through on the floor before recess, so we can get him on duty and get him going. The newspaper there, the Toledo Blade, has commented favorably on this appointment. We know of absolutely no reason to hold up Judge McQuade's nomination. Nothing has been said against this candidate, and we recommend him most highly to you, and hope he could be approved, expeditiously, so he can get on the job.

The CHAIRMAN. I wish to thank both of you Senators for appearing in person here on behalf of Judge McQuade. He comes very highly recommended, and if Senator Biden and the Democrats will agree, at your request, we will put him on the agenda for tomorrow.

I have to hear from some of them on that.

Senator METZENBAUM. I think the Democrats will. I have checked with them. I have heard of no objection——

The CHAIRMAN. Thank you very much.

Senator METZENBAUM [continuing]. And I will ask for unanimous consent.

The CHAIRMAN. Yes. I understand.

Senator Simon.

Let's see. I thought we would hear from Congressman Latta, and then we would have questions.

Senator SIMON. Yes.

The CHAIRMAN. We will now hear from the able and distinguished Congressman from Ohio, Congressman Latta, who I believe recommended this gentleman. We are pleased to have you with us.

STATEMENT OF HON. DELBERT LATTA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. LATTA. Thank you very much, Mr. Chairman.

As you can see, this nominee has bipartisan support, and he deserves that support. I have known Judge McQuade for 20 years, and I think in those 20 years, I have not heard one word said against Judge McQuade.

As has already been pointed out, he comes highly recommended by his peers, by various bar associations, but I think it is well to point out that the American Bar Association gave him "well qualified" in their recommendation to this committee.

And I think, as Senator Glenn has pointed out, we need more nominees like Judge McQuade. There is this backlog in that district of about 500 cases, and it is important that we expedite the nomination and get it to the floor, so we can get this man on the job to do a good job for justice.

The CHAIRMAN. Well, congratulations to you on recommending this fine gentleman, and having the President appoint him. And I want to congratulate the Senators for agreeing to confirm him, and, the more I have heard about him, he will make a very splendid judge.

Now we would be glad to hear from——

Senator SIMON. Mr. Chairman, not a question but just one point I want to make for my colleagues, and I do not mean this disrespectfully to this nominee, or any others. I agreed to waive the time privilege today on these nominees, but in the future, frankly, no matter whether they are from—South Carolina, Illinois, or Alabama—I do not intend to waive the time privilege.

The CHAIRMAN. Well, don't make that statement. I have got one coming up in just a few days, and he is recommended by Senator Hollings. [Laughter.]

Senator SIMON. Well, I am sure he is a good man, but I——

The CHAIRMAN. And so you just reserve that, now, until after that.

Senator SIMON. I really think that we put that time period into the rules so that we do not rush into something we may regret later. We should give the public time to scrutinize the candidates carefully. So——

Senator McConnell.

Senator SIMON [continuing]. Meaning no disrespect to future nominees, Mr. Chairman, I will insist on the rule in the future.

Senator MCCONNELL. Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Kentucky.

Senator MCCONNELL. If I may, I would like to congratulate Judge McQuade for his nomination by the President and in a sense echo Senator Simon's request.

Having just had a vacancy in one of my districts, that has existed since last October, and having had Senator Metzenbaum and others object to expediting that procedure, we will have to talk about whether we expedite this procedure. But I do congratulate you, and if you end up having to go through the paces like my nominees, and like other nominees have had to, please don't consider it an objection to your qualifications.

Senator METZENBAUM. Del Latta told me that if you object you will not get another bill through the House.

Senator MCCONNELL. He needs to do something about you, Senator Metzenbaum.

The CHAIRMAN. Senator Heflin, do you have a statement to make?

Senator HEFLIN. No.

The CHAIRMAN. We thank you, Senators, for your appearance, and of course Senator Metzenbaum is on the committee, and thank you, Congressman Latta, for your appearance here, and your strong support I am sure will assist him tremendously.

Mr. LATTA. Thank you, Mr. Chairman.

The CHAIRMAN. Any other Senators here right now? Senator Wilson I know is here. Senator Wilson, you are interested in Mr. Trott, I believe, from California. We would be glad to hear from you at this time.

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator WILSON. Thanks very much, Mr. Chairman. As Mr. Trott comes to the witness table, I must say that seldom have I heard threats exchanged with greater grace, or courtesy, than just a moment ago.

I inferred from that that there are no candidates coming from Illinois soon, but, in any case, Mr. Chairman, I am delighted to be before the committee.

I have been here many times, as the chairman knows. But today, I am here to introduce Stephen S. Trott, whom I doubt needs much introduction.

As you know, he has been nominated by the President to serve as the Associate Attorney General of the United States. You have his full record, Mr. Chairman. Let me just say that it is truly a privilege because Steve Trott is one of the most extraordinary individuals, and certainly, one of the most talented lawyers that I have ever had the good fortune to know.

As a singer, as a member of a singing group with the improbable name of The Highwaymen, he has earned a gold record. Whether it was in that capacity or in terms of his sterling record that he has compiled as a prosecutor on the local and the Federal levels, whether singing a few bars or putting felons behind bars, his career in the public eye has been both admirable, and I think truly dazzling. Indeed, Mr. Chairman, when I learned of Steve's impending nomination, I had occasion to speak with a number of well-seasoned members of the legal community in California about his career, and without exception, I heard nothing but accolades, some of which I want to share with the committee.

He was described, quote, as "The best prosecutor I have encountered in 20 years." Another member of the bar, of long experience said, he is, quote, "an extraordinary person and an extraordinary lawyer."

Another described him as an individual who was, quote, "hard to compare with anyone else." And, as befits a man who lists prestidigitation on his résumé as one of his hobbies, he is described not only as a superb lawyer, and a superb prosecutor, but as a true Renaissance man.

Mr. Chairman, Steve Trott's career as a prosecutor, as a public servant, is the most impressive that I think I have ever seen.

After graduating from a well-known Eastern law school, Harvard, he began his career as a trial attorney in the Los Angeles District Attorney's Office, becoming the chief deputy at the age of 35 with supervisory responsibility for 2,000 people.

In 1981, he was appointed U.S. attorney for the central district of California. In that position he combined a very impressive conviction record exceeding 97 percent in the year 1982. And then in 1983, Steve was chosen to head the Criminal Division of the Department of Justice with oversight responsibility for all major criminal prosecutions, other than those in antitrust, tax, civil rights, and land and natural resources. He has been personally involved in a number of highly complex, and often, very high profile cases. Be they decisions involving drug trafficking, white-collar crime, money laundering, or public corruption, Steve has made the tough decisions, and he has earned the respect of all who have worked for him, as well as those who have fought against him.

Mr. Chairman, Steve's complete résumé is before the committee, as is the record from his earlier confirmation proceeding. So I will not undertake to set out his exemplary record in great detail. I think it is well known to the committee.

I do, however, want to urge the committee to review it, to look once again at Steve Trott's background, his very impressive experience, evaluate his skills and his judicial temperament. He is not a candidate for judge today, but, in many respects, the responsibility that he has been nominated to fulfill requires that kind of judicial temperament. Certainly it calls for unimpeachable character.

And the one thing that I think echos through all of the evaluations of him, perhaps exceeding even the extraordinary ratings given him by his peers in the bar, and also those who have commented on his performance from the bench, is that they have found that his character exceeds even his professional skill. I am convinced that once your review of his record is complete, the committee will act as quickly as appropriately it can and bring Steve Trott's nomination to the full Senate so that he may be confirmed and embark upon his new responsibilities as the Associate Attorney General.

The CHAIRMAN. Thank you very much, Senator. We appreciate your taking the time to come in personally here to endorse Mr. Trott. He has made a very fine record as an Assistant Attorney General, and we will be glad to hear from him in a few minutes.

Now you can stay, or you can be excused, whichever you prefer.

Senator WILSON. Thank you.

The CHAIRMAN. Senator Denton, I believe your judge was first on the list, and Senator Heflin, do you want to go on or stay where you are?

Senator HEFLIN. I will stay with it.

The CHAIRMAN. Senator Denton, we will be glad to hear from you. I believe you are here on behalf of Joel F. Dubina, is that correct?

STATEMENT OF HON. JEREMIAH DENTON, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator DENTON. That is correct, Mr. Chairman.

The CHAIRMAN. Now you all can put your full statements in the record. If you will make the introductions fairly brief, we can save time.

Senator DENTON. Well, Mr. Chairman, it is an honor and a pleasure today to welcome this fellow Alabamian, Joel Frederick Dubina to this committee chaired by our distinguished chairman.

This gentleman is President Reagan's nominee to serve as district court judge for the middle district of Alabama. He comes to us highly qualified to serve as a district court judge and we are fortunate to have him before us today.

I offer my personal welcome to him and to his family. It is an honor to have a fellow Alabamian whose professional and public service have been so extraordinarily varied and complete.

Mr. Chairman, Joel Dubina is a graduate of the University of Alabama where he was on the dean's list for 2 years. He went on to the Cumberland School of Law at Samford University where he graduated in 1973, and after graduation served as a clerk to the man he is now nominated to succeed, Judge Robert E. Varner. He served in private law practice for the next 9 years with the Montgomery firm of Jones, Murray, Steward & Yarbrough. During that time he worked in varied areas of the law, including criminal defense work, real estate, corporate law, domestic relations, civil litigation, civil rights, antitrust and securities fraud.

Later in his law practice, he concentrated his efforts in civil litigation, primarily in the Federal courts. In 1983, he was appointed U.S. magistrate for the middle district of Alabama, which is the position in which he now serves.

I know that my senior Senator, Senator Heflin, knows a great deal about Mr. Dubina's qualifications. I know that this committee has taken an exceedingly close look at all the facets that make an excellent Federal judge.

In particular, we have stressed the nominee's professional competence, personal integrity, and fidelity to the Constitution, and Joel Dubina has all of these.

Our analysis of the nominee's professional competence has covered such areas as length, breadth and depth of legal experience, writing skills, and contributions to legal scholarship. Joel's record in this respect is a stellar one, and it is exemplary of the kind of background we look for in Federal judicial nominees.

In his past 9 years of practice, he has served as counsel or associate counsel for approximately 375 cases, half of which were heard in Federal courts. Many of these cases involved various types of litigation, covering hundreds of depositions, thousands of hours of discovery, and numerous briefs, motions and pleadings.

In the cases which he reported as the ten most significant litigated matters which he has personally handled, Joel Dubina has represented to this committee the benchmarks of legal professionalism.

In one such case, *State of Alabama* v. *Coffey County Abstract and Title Company,* Joel Dubina successfully argued his client's case before the full Alabama Supreme Court, of which my colleagues was once the chief justice, as we know.

This was also a case which the legal profession terms as one of, quote, "first impression," unquote, in which the court set a precedent regarding what nonlawyer title company employees could and could not do in conducting real estate closings.

I will submit for the record his argument in the case of *Vanguard Security Life Insurance Company* v. *Alabama State Insurance Commissioner.*

[The document follows:]

In *Vanguard Security Life Insuance Company* v. *Alabama State Insurance Commissioner,* Mr. Dubina argued against the constitutionality of an Alamaba statute which allowed the insurance commissioner to place an insurance company under an order or supervision. In this, his first argument before a three judge Federal panel, Joel Dubina was successful in overturning the State statute as an unconstitutional infringement on fourteenth amendment due process guarantees.

Senator **DENTON**. I will go on to say, the high regard for which his colleagues hold Joel Dubina became most apparent when a Federal district judge appointed Mr. Dubina as legal guardian to represent mental patients in the case of *Lynch* v. *Baxley.* Here Mr. Dubina represented the patients at recommitment hearings ordered by the judge. The writing skills portrayed by Mr. Dubina in the questionnaire he prepared for this committee are to be admired, and even envied. His case descriptions and essay responses reflect a clear, thoughtful, and tightly worded writing style which will serve him well as a district court judge.

His contribution to legal scholarship is also worth noting. As a U.S. magistrate he had his opinion in the case of *Burnette* v. *Kindt* published. Furthermore, he delivered a speech to the eleventh circuit judicial conference in May 1984, entitled, "What Can Lawyers and Judges Do To Expedite Cases in the Federal Court?"

Mr. Chairman, a nominee's personal integrity must be closely measured when being considered for Federal judgeship. In word and in deed, this man's integrity is of the highest. His integrity is reflected in his attitude and desire to serve as a judge, without interference or conflict of interest.

The third, and certainly not the least criterion, is that person's fidelity to the Constitution and to legal precedent. Joel Dubina is committed to an even application of the law without imposing his personal views on a decision. Furthermore, he believes in the principal of judicial restraint, realizing that a balance of power can only be maintained when the judicial branch adheres to its job as interpreter of the law and avoids the temptation of legislating.

Apart from his distinguished service at the bar and on the bench, Joel Dubina has given much of his time to community service both in the law, and in civic activities.

As a private practitioner, he offered free legal representation to disadvantaged persons through the Lighthouse, an organization funded through private contributions to aid individuals who cannot afford legal counsel.

He also represented disadvantaged persons without charge, based on referrals from the Montgomery County Bar Association.

In my association with the nomination process, I have never known a man who has been more universally admired and supported from his community.

He has been active in county, State, and Federal bar associations. He was the president of the Montgomery Chapter of the Federal Bar Association in 1982 and 1983.

His other civic activities include a great deal of time given to his local YMCA, and serving on the board of trustees of the Alabama Leukemia Foundation for 4 years. He and his family are active in Trinity Presbyterian Church where Joel is a member of the board of deacons. So it is with great pride, Mr. Chairman, that I recommend this extraordinary and highly qualified young man to the committee for our approval as U.S. District Court judge for the Middle District of Alabama. I thank you, Mr. Chairman, and I congratulate Mr. Dubina.

The CHAIRMAN. Thank you very much, Senator. We appreciate your coming here and recommending him. Of course you are a member of this committee and I am sure your nominee will receive the utmost consideration and should sail right through without any objection, if Senator Heflin agrees. We will now call on Senator Heflin.

Senator HEFLIN. I see Senator Kerry, and I know that he wants to get to the floor. I would be willing to let him go ahead and finish his——

Senator KERRY. I appreciate that enormously, Mr. Chairman; however, the distinguished senior Senator from Hawaii was here before me, and he is waiting, and I would——

The CHAIRMAN. The Senator from Hawaii, I believe he was the next on the list after this one.

Senator KERRY. But I thank the Senator from Alabama, and I would like to perhaps take him up on it after the Senator from Hawaii.

STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator HEFLIN. Well, first, I would like to welcome Magistrate Joel Dubina. Of course as we know, the magistrates are called judges. There has been some question about whether they should or should not, but all the lawyers refer to Joel Dubina, now, in the middle district of Alabama, as Judge Dubina, and they do with pride, they do with great respect, because he has proven himself to be an outstanding magistrate and to be an outstanding practitioner of the law prior to his appointment as magistrate.

I am pleased also to welcome his family. I understand his mother and his mother-in-law and father-in-law, and his wife and his three children are here. We are delighted that they are here.

I say to you that there is nothing wrong with this. He will make a great judge. I think we ought to proceed as rapidly as we can. If the Ohioans can work some sort of waiver, then I think that it ought to be put into place for the Alabamians, too. Anyway, Alabama is ahead of Ohio, certainly, alphabetically.

We are delighted to have him here. He not only is great in his legal field but he has devoted a tremendous amount of time to community affairs, the YMCA, the Lion's Club, the Leukemia Foundation. He is a devoted family man, a good church man. The American Bar Association has unanimously found him qualified, and rather than take up any more time, I will say that I hope that we can move expeditiously on his nomination.

The CHAIRMAN. Judge Dubina, I congratulate you on getting the nomination by Senator Denton and the full support of Senator Heflin.

They are both important members of this committee, and, if the Democrats will agree, we will put you on tomorrow and put you through, just like the Ohio Senator's, if somebody will not object to him.

Mr. DUBINA. I appreciate your courtesy.

The CHAIRMAN. It is up to them. [Laughter.]

Now, we are pleased to have the distinguished Senator from Hawaii here, Senator Inouye. Is Senator Matsunaga here, too? If you gentlemen will come around.

Alan C. Kay of Hawaii. Senator Inouye, we will be glad to hear from you, and then Senator Matsunaga.

Senator INOUYE. Senator, I would like to yield to my colleague, Senator Matsunaga.

The CHAIRMAN. Senator Matsunaga, we will hear from you.

STATEMENT OF HON. SPARK MATSUNAGA, A U.S. SENATOR FROM THE STATE OF HAWAII

Senator MATSUNAGA. Thank you, Mr. Chairman, and members of the committee, for inviting me to participate in this hearing this afternoon, and for the opportunity to introduce to you, and to other members of the committee, a distinguished member of the Hawaii bar, who, in my estimation, represents a worthy nomination on the part of the administration, as a U.S. Federal judge for the district of Hawaii.

Alan Kay enjoys an outstanding reputation in the Aloha State as an attorney of both great ability and great integrity. His family background in Hawaii dates to the early New England missionaries, a family tradition he has upheld in his own right, I might add, by active service in church affairs and charitable works.

He has been a partner in the firm of Case, Kay & Lynch, and its predecessor firm, since 1965, one of Honolulu's oldest and most highly regarded legal organizations.

His entire practicing career, beginning in 1960, has been with this firm. Born in Honolulu in 1932, Mr. Kay showed early signs of academic as well as athletic distinction, and graduated from the Lawrenceville School, cum laude.

His undergraduate career at Princeton Universtiy, where he graduated in 1957, was interrupted by a 2-year enlistment in the U.S. Marine Corps where he gained the rank of corporal. He also served in the U.S. Air Force Reserves for 8 years with the rank of captain. He earned his law degree at the University of California at Berkeley, Boalt Hall, in 1960. While his legal practice has been heavily in the real estate field, his experience has ranged across litigation and business matters.

For the last 15 years, he has served as a director of the Bank of Hawaii, and its holding company, the State's largest bank.

Mr. Chairman, and members of the committee, as you well are aware, the matter of Federal judicial appointments for Hawaii on the part of this administration in the past has been a subject of contention with both the senior Senator from Hawaii, Mr. Inouye, and myself, not because of the nominees, so much as the fact that those nominees had not submitted their applications to the Hawaii Judicial Selections Commission established to screen applicants for nomination, and to remove the appointment process from partisan politics.

For myself, I have borne no personal animus against the previous nominees, but I have taken the position that I will not support nominees who are unwilling to submit themselves for examination by the commission, which was set up to ensure an evaluation on the part of the legal profession and the community at large.

It was established by Senator Inouye and myself in associate with the Hawaii Bar Association during the Carter administration in 1979, I should point out. So our efforts to remove the nomination process from politics hardly carried any political motivation in and of itself.

Now, while Mr. Kay has been a card-carrying Republican for 26 years, and has held membership in the Republican National Committee since 1983, I am most pleased to report that he carries the unanimous endorsement of the Judicial Selection Commission of Hawaii.

If I may say so, Mr. Chairman, his professional and civic qualifications far exceed his political credentials. The commission solicited comment from the legal community and received not a single negative comment.

I think this testifies to his reputation for fair dealing and honesty, as well as civility and judicial temperament in all his community relationships.

In evaluating his résumé and making inquiries about the nominee, I myself could find only one instance of poor judgment: his choice of political party.

You are supposed to laugh, Mr. Chairman. [Laughter.]

The CHAIRMAN. I think he is a man of pretty good judgment.

Senator MATSUNAGA. The commission members were most impressed by Mr. Kay's sincerity in saying that he sought the appointment from a sense of gratitude for all that the community has extended to him in the course of raising his family and practicing his profession. He wants to give something back to Hawaii in return, he said. From the material made available to members about his background, however, I must say that he has contributed significantly to community service as well as to the profession of law, and he is to be commended for his desire to enter public service at this point of his career.

With these introductory remarks, Mr. Chairman, it is my great privilege to urge the confirmation of Mr. Alan Kay, nominee for the position of U.S. district judge for Hawaii.

Thank you very much.

The CHAIRMAN. Thank you very much, Senator.

The distinguished senior Senator, Senator Inouye.

STATEMENT OF HON. DANIEL INOUYE, A U.S. SENATOR FROM THE STATE OF HAWAII

Senator INOUYE. Thank you, Mr. Chairman.

Mr. Chairman, I wish to join my colleague, Senator Matsunaga, in presenting Mr. Kay to the committee, and in so joining, recommend to you that this nomination be considered favorably in a most expeditious manner.

I am certain the committee is well aware that the District Court for the District of Hawaii has presently three judges but two vacancies, and with Mr. Kay, we will have two of the three positions filled. We have one more to go.

Mr. Chairman, and members, Senator Matsunaga commented on the activities of the Judicial Selection Commission. On August 12, yesterday, the Hawaii Commission for Federal Judicial Appointments submitted a letter of recommendation to both of us, and if I may, I would like to submit this letter for the record.

The CHAIRMAN. Without objection, so ordered.

[The letter follows:]

Hawaii Federal Selection
Commission
c/o 1900 Davies Pacific
Center
841 Bishop Street
Honolulu, Hawaii 96813
(808) 524-1433

August 12, 1986

The Honorable Daniel K. Inouye
United States Senator
Prince Kuhio Federal Building,
Room 7325
300 Ala Moana Boulevard
Honolulu, Hawaii 96850

Dear Senator Inouye:

The Hawaii Commission for Federal Judicial and United States Attorney Appointments submits this report letter pursuant to the Charter which created the Commission in 1979 and was amended in July, 1986.

Paragraph 4 of the Charter provides that:

> If the President nominates for confirmation by the United States Senate a person not included on the Commission's certified list of candidates, the Senators shall transmit the name of the nominee to the Chairman of the Commission within 48 hours of its receipt by the Senate.

The Commission then has two weeks within which to submit to each United States Senator a report which must address four specified subjects noted in paragraph 4 and consider the personal and professional qualities listed in paragraph 6 of the Charter.

This Commission was advised that on July 28, 1986, Mr. William H. Dodd, President of the Hawaii State Bar Association, received from the United States Senators from Hawaii the name of Mr. Alan C. Kay as a nominee by the President of the United States for the position of United States District Judge for the District of Hawaii.

An executed copy of the Charter, as amended in July, 1986, and the names of the members of the Commission was forwarded to the Commission on July 31, 1986. The Commission met two times during the week of August 4, 1986. Those members who could not be physically present at the meetings were contacted by telephone, apprised of the Commission's review and proceedings, and their views solicited.

Paragraph 4a) of the Charter requires the Commission to "make available an opportunity for comment to all interested members of the Bar and legal community" concerning the nominee's practice and conduct. Requests for comments concerning Mr. Kay's practice of law and conduct in the State were solicited from the Judiciary, both State and Federal, the members of both the State and Federal Bars, and the legal community in the State.

In response to the Commission's requests for comments from members of the Bar and legal community, the Commission received six letters and two oral communications. All of the responses were positive and complimentary of Mr. Kay. The responses included a letter from Senior United States Circuit Judge Herbert Y. C. Choy and an oral communication from Senior United States District Judge Samuel P. King. Attached to this report are the written responses received by the Commission.

The Commission reviewed materials submitted by Mr. Kay to the Committee on the Judiciary of the United States Senate. The Commission also requested and received additional information from Mr. Kay concerning his financial statement. Individual members of the Commission made discreet inquiries of various persons in the community whose judgment and opinions were respected concerning Mr. Kay. The Commission also contacted the Office of Disciplinary

Counsel concerning the complaints or grievances that might have been filed against Mr. Kay. There were none. On August 7, 1986, the Commission conducted an interview with Mr. Kay.

Based upon the Commission's review of the materials submitted, inquiries made by the Commission, the responses received, and the interview conducted with the nominee, the Commission reports as follows:

A. Length and Nature of the Nominee's Practice Within the Hawaii State Bar and Federal Bar

Mr. Kay has been licensed to practice in all of the Courts of this State and has been actively practicing in those Courts since 1960. Mr. Kay's conduct in his practice of law has been exemplary and he enjoys a reputation for being a highly competent lawyer, careful, honest, hard-working, and even-tempered. His reputation for integrity is extremely high.

Mr. Kay's legal practice has been confined almost entirely to civil matters. In his 25 years of practice, he has participated in a substantial amount of civil litigation at both the trial and appellate levels. The majority of his trial experience occurred during the first twenty years of his practice. Presently, he is engaged primarily in corporate law practice but he does participate in selected major civil litigation cases.

B. Scholarly Writings and Other Activities

The Commission was not referred to any law review articles authored by the nominee or journals in which Mr. Kay published scholarly legal writings. However, it is clear from the materials submitted by Mr. Kay that he has extensive experience and a high degree of skill in writing legal memoranda and appellate briefs. The Commission believes that these can be classified as "scholarly" although they are not law review articles. It appears that his written legal work is careful, accurate and well written. The Commission believes that Mr. Kay has the requisite writing skills for the position for which he has been nominated.

C. The Extent and Nature of the Nominee's Involvement in the Community

Mr. Kay has been involved in a substantial number of community activities in the State. These activities are detailed in his response to the United States Senate Committee on the Judiciary, a copy of which is attached to this report. Some of his activities include participation in Hawaii State Bar Association activities, directorship at the Bank of Hawaii and Bancorp Hawaii, Inc., participation in the Fellowship of Christian Athletes, Prison Ministry, and the Economic Development Corporation of Honolulu. Mr. Kay has also served in the United States military: the United States Marine Corps and the United States Air Force Reserve.

D. Recommendation of the Commission as to the Ultimate Disposition of the Nomination

The Commission unanimously believes that Mr. Alan C. Kay possesses the intelligence, legal ability, integrity, independence, dedication, experience, judicial temperament, as well as the requisite personal qualities enumerated in paragraph 6 of the Charter, to be an excellent United States District Judge for the District of Hawaii. Although Mr. Kay may not have had as much trial experience or criminal law practice experience as others, the Commission does not believe that this is any ground for disqualification. The Commission unanimously recommends that the nomination of Mr. Alan C. Kay for United States District Judge for the District of Hawaii be approved.

If you have any questions or if the Commission can be of any further service, please do not hesitate to contact us.

Very truly yours,

David L. Fairbanks

David L. Fairbanks
Chairman, Hawaii Federal
Selection Commission

DLF:jy
Enclosures

cc: William H. Dodd, Esq.
President, Hawaii State
Bar Association

Members of the Hawaii Federal
Selection Commission:

Burnham H. Greeley, Esq.
John S. Edmunds, Esq.
Mr. James Wo
Cynthia Winegar, Esq.
Mr. George Chaplin
Alvin T. Shim, Esq.
R. Charles Bocken, Esq.
Mr. Sam Okinaga

HERBERT Y. C. CHOY
SENIOR UNITED STATES CIRCUIT JUDGE
P. O. BOX 50127
HONOLULU, HAWAII 96850

August 6, 1986

Hawaii Federal Selection Commission
c/o David L. Fairbanks, Esq.
1900 Davies Pacific Center
841 Bishop Street
Honolulu, Hawaii 96813

Dear Members:

This is in response to the notice sent by the chairman of your Commission, David L. Fairbanks, to all interested members of the Bar and legal community to submit comments regarding the practice and conduct of Alan Kay, Esq., who has been nominated by the President for a judgeship in the United States District Court for the District of Hawaii.

I have known Mr. Kay for some 35 years. His extensive experience as a practicing lawyer and senior member of a reputable Honolulu law firm have afforded him the technical requirements for a judicial position. But more than that, his unquestioned integrity and even temperament, qualities which are most desirable in a judge, make him a prime candidate for the lifetime appointment as a federal judge.

I unqualifiedly endorse him for a favorable recommendation by your Commission to each of the Senators from Hawaii regarding Mr. Kay.

Sincerely yours,

Herbert Y.C. Choy

HERBERT Y.C. CHOY

A LAW CORPORATION
SUITE 808, DAVIES PACIFIC CENTER
841 BISHOP STREET
HONOLULU, HAWAII 96813

TELEPHONE 521-7266

August 6, 1986

Hawaii Federal Selection Commission
c/o David L. Fairbanks, Esq.
1900 Davies Pacific Center
841 Bishop Street
Honolulu, Hawaii 98613

Re: Alan Kay, Esq.

Gentlemen:

Alan Kay has the qualities to be a fine judge. I wholeheartedly recommend him.

Very truly yours,

H William Burgess
H. WILLIAM BURGESS

HWB:en

[illegible]
735 Bishop Street
Honolulu, Hawaii 96813

Ph. (808) 521-7474

August 7, 1986

Hawaii Federal Selection Commission
c/o David L. Fairbanks, Esq.
1900 Davies Pacific Center
841 Bishop Street
Honolulu, Hawaii 96813

Re: Nomination of Alan Kay, Esq.

Gentlemen:

As an interested member in the bar and legal community, I support the nomination of Alan Kay for the position of United States District Judge for the District of Hawaii. If believe his experience acquired through years in private practice will have a beneficial influence upon the Court and that Mr. Kay will make a good Federal judge.

Very truly yours,

Cheryl Nakamura
for STEPHEN D. QUINN

SDQ:cn (Dictated by not read)

Davies Pacific Center
SUITE 915, 841 BISHOP STREET
HONOLULU, HAWAII 96813

P.O. BOX 1140
HONOLULU, HAWAII 96807
TELEPHONE 546-5820

August 8, 1986

Hawaii Federal Selection Commission
c/o David L. Fairbanks, Esq.
1900 Davies Pacific Center
841 Bishop Street
Honolulu, Hawaii 96813

Gentlemen:

The Hawaii Federal Selection Commission has requested comments from all interested members of the Bar regarding the judicial nomination of Allan Kay, Equire to the United States District Court for the District of Hawaii.

Being: a member of the Bar, interested (in Mr. Kay and the federal judiciary), acquainted with Mr. Kay and aware of Mr. Kay's professional reputation, I feel an obligation to add my comments to others wishing to aid the commission.

Alan Kay is a lawyer of unquestioned professional ability and impeccable personal integrity. He is a man worthy of the position for which he is nominated. Not merely fully qualified, Mr. Kay can be expected to add prestige to the position.

Very truly yours,

Randolph L. Corpe

Randolph L. Corpe

RLC:mn

[illegible]
CHARLES G. DWIGHT, III*
GALEN C. K. LEONG
J. D. MILLS, JR.*
[illegible]*
DOUGLAS W. MACDOUGAL*
JOHN A. LOCKWOOD*
CUYLER E. SHAW*
MICHAEL G. DIBBEN
MARGERY T. FASIG
DUANE E. KISHIMOTO
PAUL S. AOKI

FRANCIS P. HOGAN
JAMES E. HEE
DENNIS E. HEVEC
R. ELEANOR PERDOMO
ROSE Y. CALDWELL
LENNOX E. HIRANO
ROBYN B. CHUN

*A LAW CORPORATION

P. O. BOX 131
HONOLULU, HAWAII 96810

TITLE GUARANTY BUILDING
235 QUEEN STREET

TELEPHONE
(808) 524-4787

TELECOPIER
(808) 531-0360

ABA/NET ABA 1106
MCI 237-7304

August 11, 1986

Hawaii Federal Selection Commission
c/o David L. Fairbanks, Esq.
1900 Davies Pacific Center
841 Bishop Street
Honolulu, Hawaii 96813

Re: Alan C. Kay, Esq.

Gentlemen:

In my opinion, the three most important qualifications for judicial office are integrity, competence and judicial temperament.

I have known Alan C. Kay during his entire quarter-century of law practice in Honolulu and have been involved in all of litigation, negotiations, drafting and other assignments with him and opposite him. In my opinion, he has the required qualifications. His candidacy is deserving of support by the Hawaii Federal Selection Commission.

Very truly yours,

Clinton R. Ashford

CLINTON R. ASHFORD

CRA:cyk

M. B. HENSHAW 1888-1970
WILLIAM R. LOOMIS 1889-1958
DON C. HAMILTON 1914-1984
HAROLD W. NICKELSEN 1904-1985

HAROLD W. CONROY
FRANK D. GIBSON, JR.
OF COUNSEL

A PARTNERSHIP INCLUDING LAW CORPORATIONS
20TH FLOOR HAWAII BUILDING
745 FORT STREET · HONOLULU, HAWAII 96813-3888
TELEPHONE (808) 521-0400

CABLE "LAWYERS HONOLULU"
TELEX 7430042
TELECOPIER (808) 521-8887

MAUI OFFICE
33 LONO AVENUE, SUITE 380
KAHULUI, HAWAII 96732
TELEPHONE (808) 877-3441

August 11, 1986

DELIVERED

Hawaii Federal Selection Commission
c/o David L. Fairbanks, Esq.
1900 Davies Pacific Center
841 Bishop Street
Honolulu, Hawaii 96813

Dear Commissioners:

In connection with the President's nomination of Alan Kay for United States District Judge for the District of Hawaii, I would like to add my enthusiastic endorsement of the President's choice.

In all of my professional dealings with Mr. Kay I have found him to be a lawyer's lawyer, in the highest sense of the profession. His brains, education, skill, industriousness and common sense make him an ideal choice for District Judge.

I might add that his wife and family are outstanding citizens, too, and we can all be very proud of Mr. Kay and his whole family.

Aloha,

William A. Stricklin

WAS/mk

Senator INOUYE. And in so doing, Mr. Chairman, I would like to read from the closing paragraph of this report.

The CHAIRMAN. Excuse me. I observe that there is a vote on and maybe we can finish you and Senator Kerry before we have to leave.

Senator INOUYE. I can do it in 30 seconds, sir.

Mr. Chairman, this is what the commission says:

> The commission unanimously believes that Mr. Alan C. Kay possesses the intelligence, legal ability, integrity, independence, dedication, experience, judicial temperament, as well as the requisite personal qualities to be an excellent U.S. District Judge for the District of Hawaii. The commission unanimously recommends that the nomination of Mr. Alan C. Kay for U.S. District Judge for the District of Hawaii be approved.

And Mr. Chairman, I am pleased to join the commission in this recommendation.

The CHAIRMAN. Thank you very much. Mr. Kay, I want to congratulate you on being nominated by the President, and also congratulate you on having the endorsements here of both of your Senators.

They are both able and distinguished Senators, and I am very pleased that they have come in person to endorse you. Now if you will have a seat back of you, we will hear from Senator Kerry, and Mr. Weld is to be Assistant Attorney General. If you will have a seat, Mr. Weld. Is Senator Kennedy coming, do you know?

Senator KERRY. Mr. Chairman, I know that the Senator wanted to be here.

The CHAIRMAN. If he does not get here, tell me if he wants to submit something for the record, we will be glad to receive it.

Senator KERRY. I appreciate that and I will mention that to him. I know that he has also supported——

The CHAIRMAN. You may proceed.

STATEMENT OF HON. JOHN KERRY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KERRY. Thank you, Mr. Chairman.

I am delighted to be able to be here to introduce, and to commend to the committee, and to support someone who I think meets all of the highest standards that we look for in a prospective Chief of the Criminal Division of the U.S. Department of Justice.

Bill is currently serving as the U.S. attorney in Massachusetts. He is known throughout the New England region as a tough, fair, and diligent prosecutor.

I have known him for a long time as have people in Massachusetts, and I think one of the best marks of distinction is to be able to measure somebody by the kind of office that they put together and the kind of people that they attract.

I can tell you that as a former prosecutor myself, and somebody who has struggled with the effort to bring qualified people into the public sector, willing to give up high-paying salaries within law firms, Bill Weld has been second to nobody in his ability to be able to attract others of great quality and high caliber, really, of the highest professional standards and I know that he is going to continue to do that at the Justice Department.

I know there is a vote on and I will certainly be very brief, Mr. Chairman, but I do not want to leave out the fact that I think Bill Weld comes to this job with a background that is second to nobody's. He is a distinguished cumma sum laude graduate in 1966 of Harvard College. He went to the University of Oxford, subsequently, where he got a graduate degree in economics. After that, he came back and graduated with honors from Harvard Law School.

He served as a clerk for a Justice on the Supreme Court of Massachusetts. He has been an associate, and subsequently a partner in one of our most distinguished law firms in Massachusetts.

He served as associate minority counsel to the House Judiciary Committee during the impeachment hearings, and I will leave it to you to debate whether he can claim as a success, or a failure, the fact that the articles were issued

But he has forever contributed his energies and his time to the notion that law is bigger than all of us. He places it above himself.

He is a man of unquestioned integrity, a phrase we have heard repeated here, but at a time, Mr. Chairman, when this country faces major law enforcement issues of narcotics, public corruption, organized crime, I genuinely cannot think of somebody more qualified to be able to pursue those efforts, and more committed to doing so and more capable of producing results.

And I am just delighted that the President of the United States has nominated him. I think he meets the highest standards and traditions which we seek to put into a position of that kind of responsibility, and I hope that the committee, after its own inquiry, will concur with my personal judgment and confirm him, and put him to work as fast as possible.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator, for your personal appearance here on behalf of Mr. Weld. He seems well qualified and there should be no trouble getting him through.

Now we will take a recess—there are no other Senators here, are there? I believe all except Senator Kennedy have appeared, and if he does not appear, if you will tell him he can put a statement in the record if he wishes to.

Senator KERRY. I will do that right now when I see him.

The CHAIRMAN. So we will take a recess now for a few minutes until we can go and vote. There is a vote on over in the Senate.

Senator KERRY. Thank you, Mr. Chairman.

[Vote recess.]

The CHAIRMAN. The Committee will come to order.

Senator Heflin.

Senator HEFLIN. I understand Senator Kennedy wants to introduce his man. I will be glad to yield.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Mr. Chairman, I appreciate the courtesy of my good friend from Alabama. I was not able to be here at the time that my colleague, Senator Kerry, had the opportunity to present the nominee for Assistant Attorney General for the Criminal Division for the Department of Justice.

I do want to just add, Mr. Chairman, a very positive word to the members of this committee, and to the Senate, in urging favorable consideration of William Weld for this particular position.

He has demonstrated an academic excellence in his work in the college at Harvard, graduating summa cum laude, attending Oxford University, where he had a very distinguished record in economics, and also receiving his degree at Harvard University.

He demonstrated his strong commitment to the law in working as a counsel, or as an assistant to one of our very distinguished members of the Supreme Court, Justice Cutter.

After he graduated from the law school and served in a very distinguished way, he demonstrated his commitment to public service in the period of the 1970's in working with the House committee during the various impeachment proceedings, a complicated, involved, and tough assignment.

Later, he has served as our U.S. attorney in Boston. He has, I think, demonstrated in that position a willingness to take on the tough and difficult problems that we have faced in Boston, whether it has been public corruption, or arson, or the range of different problems that we have faced there in that community.

He has assembled perhaps the finest staff of any U.S. attorney in the country, and that the decisions have been made on the basis of merit, and I know that both from personal experience and from my own conversations with the members there. And they have been dedicated to the whole service that he has provided as a U.S. attorney in Boston. He is respected by the judges that serve on our district court there, for the kind of work that he has done in that particular position.

So, I just want to say, Mr. Chairman, I think the Justice Department is very fortunate to have this nominee. I think when approved, the Justice Department and the American people will be very well served, and I am delighted to have an opportunity to urge speedy and favorable action for this outstanding nominee for this extremely important position. I appreciate the courtesy of the Chair in permitting me to add these words, and ask that they be placed in the appropriate place in the record.

The CHAIRMAN. Without objection, if you will let Senator Kennedy's statement follow the others concerning Mr. Weld in the record.

Judge Dubina, you can come up. I would like for Judge Dubina, Mr. Kay, Judge McQuade, Mr. Trott, and Mr. Weld, to all stand up and be sworn. Just hold up your right hands. Will the testimony you give in this hearing be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. DUBINA. I do.

Mr. KAY. I do.

Judge McQUADE. I do.

Mr. TROTT. I do.

Mr. WELD. I do.

The CHAIRMAN. Have a seat.

Without objection, we will place a brief résumé in the record.

TESTIMONY OF JOEL F. DUBINA, TO BE U.S. DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF ALABAMA

The CHAIRMAN. I believe you were born in Indiana but you went to school in Alabama——

Mr. DUBINA. That is correct, Mr. Chairman.

The CHAIRMAN [continuing]. University of Alabama, and also, Cumberland School of Law in Alabama?

Mr. DUBINA. That is correct, Mr. Chairman.

The CHAIRMAN. You are now a U.S. magistrate for the middle district of Alabama?

Mr. DUBINA. Yes, sir.

The CHAIRMAN. You have been nominated by the President and endorsed by both Senators. I am just going to ask you a few questions.

Would you like to introduce your family?

Mr. DUBINA. I would, Mr. Chairman. My wife, Beth, is here, and my three children, Britton, Martha, and Mitchell. My mother is here, Majorie Willhardt, and my inlaws, Betty and Bill Gordy from Montgomery.

I am honored to have them here with me.

The CHAIRMAN. We are glad to have all of you here.

Judge Dubina, you presently serve as U.S. magistrate for the middle district of Alabama according to the record, and your statement. Now the President has nominated you to be a U.S. district judge. How do you feel about your own capacity, at this point in your career, to carry on the very significant power and responsibility of being a Federal district court judge?

Mr. DUBINA. Upon graduating from law school, Mr. Chairman, I served as a law clerk for a U.S. district judge in the middle district of Alabama. I think that experience was invaluable to me, as I was able to see, firsthand, how the Federal courts work.

Subsequent to my clerkship with a Federal judge, I went into the private practice of law with one of Montgomery's better law firms. I was engaged in the general practice of law, specializing in litigation, primarily in the Federal courts.

As most young lawyers, when I first started practicing law, I accepted many criminal cases. As my practice grew and progressed, it seems that I was trying more civil cases, primarily in the Federal courts.

On November 24, 1983, I was appointed by the U.S. district judges of our district to serve as a U.S. magistrate, and I have been in that position ever since.

As a U.S. magistrate I have tried misdemeanor cases with, and without juries. I have handled petitions for writs of habeas corpus, filed under 28 U.S.C. section 2254. I have heard civil rights actions filed under 42 U.S.C. section 1983, and written over 1,000 reports and recommendations for my district judges. I feel that these experiences qualify me to take on the awesome duties of a U.S. district judge.

The CHAIRMAN. As a magistrate you try a good many cases that normally the Federal district judges would try, if we did not have magistrates, don't you?

Mr. DUBINA. That is correct, Mr. Chairman.

The CHAIRMAN. Judge Dubina, would you tell the committee how you would handle an instance in which counsel for one of the parties in your court was obviously not a skilled litigator, and was not prepared to adequately represent the interests of his, or her, client.

Mr. DUBINA. I think my answer to that question, Mr. Chairman, would depend largely on whether we are talking about a criminal case or whether we are talking about a civil case.

Certainly, if we are talking about a criminal case, as you and the other members of this committee are well aware, a defendant has a constitutional right to effective counsel; therefore, in a criminal case, I certainly would say something to counsel.

I would not say it in the presence of a jury, but I would probably take a recess and tell the lawyer that he is not representing his client well. On the other hand, I would not like to penalize the other side for being ready, and in a civil case, I would be much more reluctant to get involved in talking to a lawyer about whether or not he was prepared to try the case.

The CHAIRMAN. In a criminal case, suppose you find a lawyer who is incompetent, what would you do?

Mr. DUBINA. During the course of a trial?

The CHAIRMAN. Yes.

Mr. DUBINA. I would take a recess, and I would try to assist that lawyer in any way I could to better represent his client.

Otherwise, I would be fearful that if he did not render his client effective assistance, I would see that case at a later time in Federal court on a petition for writ of habeas corpus.

The CHAIRMAN. Judge Dubina, in response to a portion of the committee's questionnaire on judicial activism, you stated, in part: "While I believe that the courts of our country should be open to all of our citizens, no matter what their economic status or social standing, I believe that something must be done to slow the present burden of litigation in the Federal courts."

Would you tell the committee what, in your opinion, is needed to slow the present burden of litigation in the Federal courts?

Mr. DUBINA. Mr. Chairman, in the middle district of Alabama, we have five major prison facilities.

The CHAIRMAN. Have what?

Mr. DUBINA. Five major prison facilities. Our courts are literally swamped with actions brought both under 28 U.S.C. section 2254, habeas corpus petitions, and civil rights cases under 42 U.S.C. section 1983.

I think one thing that really could help would be a statute of limitations in habeas corpus actions. When a State prison inmate exhausts his, or her, State remedies, it would be very helpful if, say, within a year, or within 2 years after that time, there would be a cutoff, where the prisoner could not bring an action for Federal habeas corpus in our court.

I understand that the Senate, approximately a year ago, passed such legislation. I further understand that it was subsequently defeated in the House.

I would respectfully urge the Senate, if possible, to try in the future to bring up again some kind of legislation dealing with this problem.

The CHAIRMAN. The Senate passed it and sent it to the House and they stopped it, and it is now on the Senate calendar again. I hope we can get it up. Those are all the questions I have. The distinguished Senator from Illinois.

Senator SIMON. I believe Senator Heflin is ahead of me in the questioning.

Senator HEFLIN. I will go ahead and defer to you. I may not have any questions.

Senator SIMON. Yes. First of all, Judge Dubina, I note a very bipartisan background in your record, and I commend you for that.

Mr. DUBINA. Thank you, Senator.

Senator SIMON. Among other things, I note you worked as a laborer, a common laborer for the Ziegler Meat Packing Co. That may sound like a minor point, but I think it is going to make you a better judge, in the long run.

Mr. DUBINA. I wish that I had mentioned that particular employment when I answered the chairman's first question. I worked many jobs in the summers, Senator, not just as a laborer. I might well be the only college graduate to work on the night shift in a meat packing house, but I did do that.

Senator SIMON. All right. I understand that you have been involved in ownership of real estate which has restrictive covenants on it, and you are taking care of that, is that correct?

Mr. DUBINA. That is correct, Senator Simon. I am a limited partner in a partnership that owns some real estate in Montgomery. It came to my attention about a month ago when I was told by the FBI, that there were restrictive covenants on several pieces of property owned by the partnership. I want you, and the other members of this committee to know that those covenants are personally offensive to me. I did not know that those covenants existed at the time the property was purchased. It was purchased in approximately 1975 or 1976. I am in the process of liquidating my interest in this partnership.

Senator SIMON. Thank you. Let me just ask one other question. I notice that you are also on the board of trustees of a Presbyterian school. Is that school open to everyone, regardless of background?

Mr. DUBINA. My understanding is that it is, Senator, The school does have tax-exempt status, and would not have tax-exempt status if it were not open to everyone, including minorities.

Senator SIMON. I thank you. I have no further questions. Your background looks excellent. I have every reason to believe that you are going to make an outstanding judge.

Mr. DUBINA. Thank you very much, Senator.

The CHAIRMAN. Senator Grassley.

Senator GRASSLEY. Mr. Chairman, I have no questions. I just want to compliment the nominee for his appointment to this very prestigious position.

Mr. DUBINA. Thank you very much, Senator.

The CHAIRMAN. Senator Heflin.

Senator HEFLIN. Good luck.

Mr. DUBINA. Thank you very much.

The CHAIRMAN. You are now excused.

Mr. DUBINA. Thank you, Mr. Chairman.

The CHAIRMAN. Next is Mr. Kay of Hawaii. Will you come around, Mr. Kay.

TESTIMONY OF ALAN C. KAY, TO BE U.S. DISTRICT COURT JUDGE FOR THE DISTRICT OF HAWAII

The CHAIRMAN. I notice that you graduated from Princeton University.

Mr. KAY. That is correct, Mr. Chairman.

The CHAIRMAN. You went there from 1951 to 1953, and then 1955 to 1957, is that right?

Mr. KAY. Yes, sir.

The CHAIRMAN. You were out 2 years?

Mr. KAY. Yes. I was in the Marine Corps for 2 years in between there.

The CHAIRMAN. Marine Corps. I want to commend you for serving in uniform.

Senator HEFLIN. Particularly the Marine Corps.

The CHAIRMAN. Well, any service, wearing a uniform, is an honor to the country.

Senator HEFLIN. Oh, yes, sir.

The CHAIRMAN. Particularly the Marine Corps, he says. Now you got your law degree from the University of California, I notice.

Mr. KAY. Yes. I graduated from the University of Berkeley—I mean, University of California at Berkeley, better known as Boalt Hall.

The CHAIRMAN. Without objection, we will place a brief résumé in the record.

Do you want to introduce your family?

Mr. KAY. Yes. I would like to introduce my wife, Pat, my little boy, David. My daughter, Anna, and other son, Peter, are not able to——

The CHAIRMAN. Mr. Kay, I cannot hear you. Speak in the loudspeaker.

Mr. KAY. My wife, Pat, and my little son, David, and my daughter, Anna, and our other son, Peter, are not able to be with us.

Senator SIMON. I am not sure your little son approves of this process. [Laughter.]

The CHAIRMAN. Now Mr. Kay, I believe you have been a practicing attorney since 1960, is that right?

Mr. KAY. That is correct, Mr. Chairman.

The CHAIRMAN. During that time, your litigation experience has been exclusively civil in nature, is that correct?

Mr. KAY. Almost entirely. I have handled just a few criminal cases.

The CHAIRMAN. Would you tell the committee what steps, if any, you have taken to prepare yourself for the criminal caseload that awaits you at the Federal district court.

Mr. KAY. Yes, Mr. Chairman. I have, I should say, been a member of the Good News Mission Prison Ministry, so I am familiar with the problems that confront prisoners. I have been reviewing the Federal rules. I have been reviewing the material that the Federal Judicial Center has sent to me. I do plan to attend the judge's school in the first week of September and in the last week of September, and I of course will be working with my colleagues, and taking their advice from the experience that they have, and I recognize that I do need to shore up on those procedures.

The CHAIRMAN. You feel you will have no trouble trying criminal cases?

Mr. KAY. Pardon me?

The CHAIRMAN. You feel you would have no trouble trying criminal cases?

Mr. KAY. No. I do not believe I will.

The CHAIRMAN. Mr. Kay, would you tell the committee what procedures you will follow in determining any potential conflicts of interest and how you intend to resolve them.

Mr. KAY. Of course I will be resigning from my law firm immediately upon being sworn in. I will submit any other potential conflicts to the Judicial Ethics Commission and I will certainly resign from any conflicts that that commission sees.

The CHAIRMAN. Mr. Kay, one of the criticisms of judicial activism is a tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals. Do you feel that this criticism is valid, and would you please explain your answer?

Mr. KAY. Yes, Mr. Chairman. Our Government is founded on a system of separation of powers, and checks and balances with the executive branch—or the legislative branch, I should say, making the laws, the executive branch enforcing and administering the laws, and the judiciary interpreting the laws.

So the judiciary should interpret laws but should not be involved in policymaking, and therefore I believe that the judiciary, and any court, should limit itself to the issues before it, and should not become involved in widesweeping social changes.

The CHAIRMAN. The 10th amendment to the Constitution provides that "All powers not specifically delegated to the Union—the Federal government—are reserved to the States."

Some judges have gone into almost every conceivable field of activity. How do you feel about that?

Mr. KAY. Well, I feel that the 10th amendment certainly should be honored, and that those powers that are reserved to the State should be simply that. They should be reserved to the States and that the courts should not attempt to take over any nonjudicial function.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. Yes, Mr. Chairman. As I look over your background, Mr. Kay, your lack of criminal experience would appear to be an area of weakness. The chairman has touched on this point.

We have had a few nominees with backgrounds similar to your own who have indicated to us that they would be willing to take a week off and just sit in some criminal trials to get a better feel for them.

Would you be willing to do something like that?

Mr. KAY. I certainly would, Senator. I think that is very good advice and I will follow that.

Senator SIMON. I have no further questions, Mr. Chairman. Thank you.

The CHAIRMAN. Senator Grassley.

Senator **Grassley**. Mr. Chairman, again, I have no questions and want to congratulate the nominee.

Mr. **Kay**. Thank you, Senator.

The **Chairman**. I congratulate you on your appointment and I wish you success on the bench.

Mr. **Kay**. Thank you very much, Senator.

The **Chairman**. And if the Democrats will agree, we will put you on the agenda tomorrow.

Our next witness is Richard B. McQuade, Jr.

TESTIMONY OF HON. RICHARD B. McQUADE, JR., TO BE U.S. DISTRICT COURT JUDGE FOR THE NORTHERN DISTRICT OF OHIO

The **Chairman**. Judge McQuade, we are glad to have you here.

Judge **McQuade**. Good afternoon, again, Senator.

The **Chairman**. I just have a few questions.

You have served as a judge for the court of common pleas in Fulton County, OH, since 1978, I believe?

Judge **McQuade**. Yes, sir.

The **Chairman**. Is that a court of unlimited jurisdiction? Do you have the power of death, if the State has a death penalty law, and unlimited jurisdiction in civil matters?

Judge **McQuade**. It is a court of what is called general jurisdiction, Mr. Chairman, in Ohio. The county, by the way, of Fulton, is a relatively small county of 40,000 people, and the court of common pleas handles all felony criminal matters, all civil matters, in which the amount in dispute is over $3,000, and we are fortunate enough also to handle divorce and dissolution cases. All appropriation cases and injunctive actions.

We do have the death penalty in Ohio, and the crime is called aggravated murder in Ohio, and that case is indeed tried in the common pleas court.

The **Chairman**. In other words, your court is the highest trial court in the State then?

Judge **McQuade**. Yes, Mr. Chairman.

The **Chairman**. Judge McQuade, do you feel that a judge should assume direct control over complex issues in cases in order to avoid delays and to effectively manage such cases?

Judge **McQuade**. Mr. Chairman, I do, and in fact I would extend that beyond complex cases to any case. It has been my history, or trademark on the bench, that I carefully monitor the progress of cases.

I early submit them to pretrial. At the pretrial, discovery cutoff dates are set. At the pretrial summary judgment, if any motions, are set. At the pretrial, depositions are set, place and times of depositions, and firm trial dates, barring death, or worse, are set.

I believe, as a matter of principle, that the public is best served by cases coming to an early and yet just disposition.

The **Chairman**. Judge McQuade, do you believe that changes in the law should be reserved to the legislative body whose members can be altered by the voters, if elected officials fail to reflect the values of society?

Judge **McQuade**. Mr. Chairman, I do. As judge—pardon me—Mr. Says, has so well said to you, I too am an ardent believer in the separation of powers. I am a firm believer that public policy is best left to the legislature, and to the legislators who are elected in our democratic process by our citizens. I am reluctant to see courts indulge, at all, in the legislative process.

However, of course the courts are there to make sure that there is no manifest deprivation of constitutional rights to any of our citizens.

The CHAIRMAN. Now some judges have taken over running school districts and running hospitals, and running other State institutions, and it is what we frequently call judicial activism.

Judge MCQUADE. Yes, sir.

The CHAIRMAN. It has always been my opinion that it is better left to local people, and the people in the States run their own institutions.

There may be some instance in which a judge feels called upon to act, but as a general rule, it seems to me those matters should be left to the States, under the Constitution.

How do you feel about it?

Judge MCQUADE. Mr. Chairman, without citing any particular instance as to how I might react, I again want to reiterate, that as a—I would move into, or intervene—if that is the proper word—in the legislative or the executive functions of government with extreme reluctance, and only in cases in which, again, there was a manifest—and I again reiterate—a manifest deprivation of a constitutional right to our citizen.

The CHAIRMAN. The distinguished Senator from Iowa.

Senator GRASSLEY. Well, again, Mr. Chairman, I do not have any questions of this nominee and I want to congratulate you on your appointment.

I had a chance to visit with him privately, outside, and I respect one of the Congressmen that was with him, Del Latta, and I am sure that based on those recommendations, he will make a good nominee.

Judge MCQUADE. Thank you, Senator.

The CHAIRMAN. I believe I requested that a brief résumé of his go in the record.

Those are all the questions I have, Judge. I hope you have a successful tenure on the bench, and I predict you will.

Judge MCQUADE. Thank you, Mr. Chairman.

The CHAIRMAN. You are now excused.

Mr. TROTT. And Mr. Trott, I think there is a vote here. If we hurry, I think we can get through with both of you in the next 10 minutes.

Senator GRASSLEY. Mr. Chairman, I am going to have about 10 minutes of questioning of Mr. Trott, so should I go vote and then race right back?

The CHAIRMAN. Yes. That will be all right.

Without objection, we will place in the record a brief résumé of you. I think it speaks for itself.

TESTIMONY OF STEPHEN S. TROTT, TO BE ASSOCIATE ATTORNEY GENERAL OF THE UNITED STATES

The CHAIRMAN. You graduated from Harvard Law School, and you were with the office of district attorney, a deputy district attorney of Los Angeles County. A U.S. attorney, central district of California. Assistant Attorney General, Department of Justice. Now you have been named as Associate Attorney General, I believe.

Would you like to introduce any of your family who are here?

Mr. TROTT. Yes, I would, Mr. Chairman. My wife, Sally, is with me. She is right behind me in the front row. Thank you.

The CHAIRMAN. We are glad to have you with us.

Mr. Trott, since 1983, you have been the Assistant Attorney General for the Criminal Division, U.S. Department of Justice.

Would you tell the committee what you feel has been the major accomplishments of the Criminal Division under your leadership.

Mr. TROTT. Mr. Chairman, the Criminal Division during my tenure—of course as a team effort—has produced very good results in a number of areas. Let me just briefly touch on them.

In the area of espionage, for example, anybody who reads the newspapers knows that almost every week there is a new espionage prosecution. I am very pleased to announce that literally all, with the exception of one of those prosecutions, has been successful.

In the area of organized crime, the Organized Crime Strike Force Program that reports to me, has been successful in indicting and in prosecuting leaders of organized crime syndicates in the major cities throughout the United States.

In the area of drug trafficking we have also been very active. We have succeeded in using the tool of asset forfeiture to take away the ill-gotten gains amassed by drug traffickers, really throughout the world, in an attempt to destroy their organizations. And we have also created an international link of allies to break bank secrecy jurisdiction that prevent us from getting information in these areas.

White-collar crime is another area that we have attended to with great vigor. We have brought cases in the area of defense procedure fraud, health care provider fraud, boiler rooms, bank failures, and others including significant cases in the area of public corruption.

During my tenure, unfortunately, two Federal judges have been successfully prosecuted for corruption. In the area of child pornography, an area that we have looked at very carefully, we have increased the number of child pornography cases successfully around the country.

Congress, a number of years ago, mandated the Criminal Division to look for people in the United States who were involved in persecutions of peoples during the unfortunate era of world history during World War II. The Office of Special Investigations [OSI], has been very successful while I have been there in carrying out this mandate.

We have also succeeded in forging new ties between State, local, and Federal law enforcement agencies so that we can function as a unit against the many complex problems that face us; and Mr. Chairman, I certainly cannot take credit for this personally, but the Federal family involved in law enforcement is responsible for increasing the population in the Federal prison system from 20,000 to 40,000 during the time that we have been there.

We like to think that that is a measure that protects the American public from criminals.

The **Chairman**. Mr. Trott, would you tell the committee what your duties will be under the Attorney General, and have you in fact discussed this matter with Attorney General Meese?

Mr. **Trott**. Yes, Mr. Chairman, generally, I have. Certainly, however, not having been confirmed by the Senate, I have not taken over the job, but it is the understanding that I will be active in matters involving the criminal jurisdiction of the Department of Justice, involving the Federal Bureau of Investigation, the Drug Enforcement Administration, the prison system, the U.S. Marshal's Service and the U.S. Attorney's Offices, including the Criminal Division itself where I now work.

The **Chairman**. Mr. Trott, the increase in drug trafficking in our country and the means required to reduce this illegal activity are important issues with all the members of this committee.

Do you feel that the drug enforcement agencies have adequate resources to combat this problem, and do you have any recommendations that might reduce the illicit drug flow?

Mr. **Trott**. Mr. Chairman, I fully believe that if the president's recommendations to Congress with regard to our budgets for 1987 and 1988 are followed, we will have a strong right arm and the resources to combat drug trafficking.

My only particular recommendations in that regard are that we recognize fully that the battle against drug trafficking which threatens this Nation has to be conducted on two levels: first, against the supply side which is what we have been doing with tremendous vigor for the last 6 years, but also on the demand side.

For the last 2 years we have been shifting our focus to include that. It has become clear to all of us, that to defeat the drug menace, we not only have to knock off the drug suppliers but decrease the demand for drugs in the United States, and that is something that the Department of Justice, in conjunction with the rest of the Federal agencies, and the Congress, will continue to pay significant attention to.

The **Chairman**. Mr. Trott, will you respond to requests to appear and testify before any duly constituted committee of the Senate?

Mr. **Trott**. Mr. Chairman, yes, I will.

The **Chairman**. Those are all the questions I have. I hope you enjoy your office of Associate Attorney General and I wish you great success in it.

Mr. **Trott**. Mr. Chairman, thank you very much.

The **Chairman**. Now Senator Grassley has some questions. If you will just step aside until he comes back.

Mr. **Trott**. With pleasure.

The **Chairman**. Mr. Weld, come around, please.

Now Mr. Weld, without objection, I will put a copy of your résumé in the record.

TESTIMONY OF WILLIAM F. WELD, TO BE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

The **Chairman**. Mr. Weld, do you want to introduce your family.

Mr. **Weld**. My wife, Susan Weld, is here, Mr. Chairman.

The **Chairman**. Since 1981, you have served as U.S. attorney for the district of Massachusetts. Now you have been nominated for the position of Assistant Attorney General in charge of the Criminal Division.

You will be responsible for the development and enforcement of criminal statutes in a vigorous, fair and effective manner.

You will also be responsible for leadership in the enforcement of large and complex criminal cases in Federal priority areas.

As Assistant Attorney General, what would be your priority for enforcement efforts as they relate to the Criminal Division?

Mr. **Weld**. I think, Mr. Chairman, that the problems presented in the areas of narcotics and organized crime—and they do overlap—will probably absorb a greater percentage of my personal time than any other set of issues.

Two other areas which I expect to address personally, and focus on, are the areas of public corruption and white-collar crime. We have been very active in the district of Massachusetts, in the course of the last 5 years, in both of those areas. We have secured approximately 100 convictions in public corruption cases as against only 2 or 3 acquittals.

We have been active in the area of defense procurement fraud. Boston is a large financial district, and I would hope to apply what I have learned there to a white collar and public corruption program nationwide.

One other area that I intend to devote personal time to is a coordination of a national effort on the problem of pornography, not only prosecutions of child pornography, but——

The **Chairman**. Excuse me. We have to stop and go and vote now. Senator Grassley will be back and probably ask you some questions.

We will take a recess.

[Vote recess.]

Senator **Grassley** [presiding]. I would call the meeting back to order, if I could.

It has been suggested that the most efficient way to do this would be to have you come back, Mr. Trott, and then we would go back to Mr. Weld. And it is my understanding, from staff again, that Senator Thurmond has asked if I could complete the meeting, and I did indicate just before I left that I had maybe about 10 minutes of questioning.

FURTHER TESTIMONY OF STEPHEN S. TROTT, TO BE ASSOCIATE ATTORNEY GENERAL OF THE UNITED STATES

Senator **Grassley**. And I would start off by saying that sometimes, you and I have had some confrontations, and I am not sure whether things are always so smooth, even today. But I do appreciate, within the last several months, your going the extra mile to help us get some information that we had some previous difficulty getting. And I do not know whether the future will always be smooth, but at least I feel much better about voting for your nomination now than maybe I would have a year ago.

And there are not any other members here, but I think I needed to make that explanation before I ask you some questions. The questions deal not so much with yours and my relationship as they do institutional problems within the Justice Department that I want to ask you about.

And also, now that you are in a position where you will be exerting more leadership than before, how you might look at some of these things.

As you know, I have had several discussions with you and others about the Justice Department's willingness and ability to prosecute Government procurement fraud. And as you also know, Mr. Trott, I have been very concerned about the Justice Department's record which shows, from my standpoint a long-term and a severe lack of effective enforcement in this area. Very recently, though there has been some evidence of improvement—for instance, a few cases coming out of some U.S. attorneys' offices around the country, and I hope that this is an indication that Government fraud is beginning to move off the bottom of the priority list within the Department.

But I remain troubled by continued reports from individuals working directly on these cases of slowed down, dropped, or bungled investigations.

I also remain troubled by a lack of evidence that the main Justice Department is providing an expert team to take on major and complex cases.

Even though there was a commitment made 4 years ago of this massive amount of help that would come from main Justice on very major and complex cases, it appears this commitment hasn't materialized.

And I am also troubled, to some extent, by reports of some major cases being stalled in the pipeline.

Again, before I ask you the first question, obviously, one of the reasons I am interested in this is because we have a trillion dollar budget for Federal programs and procurement. There is only one agency that can really ferret out the outright cheating and stealing of taxpayers' money, and that is the Justice Department.

I believe that especially in our current debt crisis that policing fraud has to be a core Federal function. And as you know, I have expressed to you some doubts about whether Justice is putting top priority on this.

One bit of evidence along this line would be the Attorney General's testimony before this committee in regard to the Justice Department budget.

He offered 13 pages of testimony that specifically lists the Department's core Federal functions, and I did not see on that list any mention of policing against Government fraud. It was not even mentioned.

So this is my question: I would like to know whether you believe Government fraud law enforcement, is a core Federal function, and if you do, what you will do in your new position to improve the Justice Department's record in this area?

Mr. TROTT. Mr. Chairman, first, I could not agree with you more. Fraud against the Government is a very important priority, and, as a matter of fact, the Economic Crime Council which was established by William French Smith now a number of years ago to establish priorities for the Federal Government in the area of white-collar crime, clearly, and unmistakably, identified Government program fraud as the No. 1 white-collar priority within the United States.

Within that program itself, defense procurement fraud as being the biggest ticket item, in terms of taxpayer dollars, is the No. 1 priority.

Since that time, the Criminal Division and the U.S. Department of Justice, and the FBI, working with the Department of Defense, have attempted continuously to increase the efficiency of our program.

We recognized, coming out of the 1970's, that we did not have the capacity to attack these cases with the energy and with the intelligence that was necessary to do a successful job.

As you now know from your careful work in this area, these are huge complex cases involving, sometimes, millions of documents.

Some prosecutors, frankly, look at them and blanche at the thought of tackling these monsters. It is in that regard that we do have a fraud section in the Criminal Division and they have conducted numerous seminars for prosecutors around the country.

This is an area that has been emphasized, and we are very pleased with the record that we have been able to produce in the last couple of years. Never before have major defense contractors such as General Electric, General Dynamics, Rockwell, and many others that you know about and I know about, been subjected to criminal prosecution.

Our objective is to enforce the laws that you put on the books and to make sure that the taxpayer's dollar and the defense industry is protected against these frauds.

I think on occasion I send you a letter about a U.S. attorney's office, and Mr. Bonner's office, for example, in Los Angeles, has been very active in this area and producing many impressive convictions.

Mr. Weld, who is with me today, has been one of the leading U.S. attorneys around the country in picking up defense procurement fraud as a major white-collar priority, and in bring cases to the Federal courts.

I know, in talking with him, that he is going to continue that as an area of special interest, and I think that working together we will continue to upgrade this program.

So again, the goals that you have outlined, which I fully share, are being carried out. There have been instances, along the way, where we could have done a better job. As I have indicated to you, in private, we are not perfect, but our goal is to achieve the best level of prosecution that we can. Now in the budget cycle, we have made sure in the Department of Justice this year, that the white-collar resources of the Department, in terms of prosecutors, and the white-collar resources of the Federal Bureau of Investigation, are getting their fair share of the Federal budget so that we can continue this effort.

Senator **Grassley**. OK. Now is that last statement in regard to the fact that I stated that the Attorney General's testimony did not refer specifically to Government fraud, and you are saying that it is still very prominent, and major even though it was not listed there?

Mr. **Trott**. That is absolutely correct. That was identified by the Attorney General at our management meeting as a priority of his, and I am a member of the Department Resources Board.

There are four of us that sit down and take a look at the budget, and I can guarantee to you that we look very carefully at the white-collar resources to make sure that that remains as a priority.

Senator **Grassley**. Well, then perhaps you have an explanation of why the Attorney General did not highlight it in his statement justifying the budget before the committee this time?

Mr. **Trott**. Senator, I am not sure, but I can show you our internal budget documents, for example, from the Criminal Division, where we identify this as a very important priority. I am referring now to the 1988 budget that we have just finished, and that will continue to be a priority item of the Department of Justice.

Senator **Grassley**. In regard to this Economic Crime Council report that you make mention of, in their last report, they did suggest that defense fraud prosecution was very inadequate.

Isn't that true, that that was in their report?

Mr. **Trott**. We identified, in a very candid report, areas of opportunity for increased effort. That is correct.

Senator **Grassley**. As a followup of putting some emphasis upon this, I would like to ask you whether you would consider, as a way of improving procurement fraud law enforcement, the establishment of regional task forces, or the earmarking of certain specific resources in targeted U.S. attorney's offices, specifically for prosecuting fraud against the Government?

Mr. **Trott**. We certainly would look at that approach and in fact in some offices, procurement fraud units have been set up to do exactly what you suggest. I will take a look, as I know Mr. Weld will, at any idea that might make our program work better.

I am somewhat reluctant to create a Washington-based unit that goes into the field to tackle these problems. I think in the long run, we are better served with U.S. attorney's offices all over the country where we have defense industries located, to take care of this problem with the assistance of the fraud section in Washington.

On the basis of my experience, I think that is a better way to go. In the past, flying squads that have gone out from Washington have not worked very well.

Senator **Grassley**. I think you and I would be talking the same language. Maybe I did not emphasize enough, but I am speaking of regional task forces.

Mr. **Trott**. Yes; regional task forces that especially work out of the U.S. attorney's offices, are things that have been created, and I think that they could be very helpful.

Senator **Grassley**. So you are really saying there is some use of this out there?

Mr. **Trott**. Yes; U.S. attorney's offices have identified this as an area that they pay special attention to, and they have devoted resources to attacking that problem.

Senator **Grassley**. OK. Well, then, let me be candid, and say, I do not recognize it, and let me say, too, that maybe then it is being used too sparingly, and I guess maybe I think in terms of the prosecutors out there with their own—you know—they have their own responsibilities and own concerns, and it just seems to me that because of the complex nature of fraud cases, that maybe it just cannot get the attention from the local attorneys, prosecutors, because of their other responsibilities.

Mr. **Trott**. The Economic Crime Council mandated that the major U.S attorney's office in these areas have fraud units with experienced fraud prosecutors to overcome the problems that you identify.

But you put your finger on something that is very, very difficult, Senator, and that is deploying resources. As you well know, we have under our jurisdiction espionage cases, terrorism cases, bank robbery, drug trafficking, child pornography, Nazi fugitives, a whole host of important areas, all of which engage the attention, and properly so, of the American public.

The most difficult job I have, and the most difficult the managers in the FBI with whom I work have, is deploying those resources.

In California, for example, in the central district, there are only 100 lawyers in the U.S. attorney's office. That is a district of 15 million people. Only 60 are devoted to Federal criminal prosecutions; 60 Federal prosecutors for the central district of California is a very small number. Across the street, in the district attorney's office, there are 700 deputy district attorneys.

So I share your concern for white-collar crime. We would like to have many more resources devoted to it, but when we get the budget that we get, within the parameters of Gramm-Rudman, and all the financial difficulties in which we find ourselves, we do the best we can to maintain it as a priority.

Senator **Grassley**. OK. Now I cannot fault you if we, you know, make revisions of budgets up here, but now, you are planning—you made reference to the 1988 budget, and I imagine you are in the cycle where, within 60 days you have to have that at OMB, I would guess.

Mr. **Trott**. Yes.

Senator **Grassley**. And you just mentioned putting greater resources in this area.

Mr. **Trott**. Yes.

Senator **Grassley**. Now, how much greater do you plan on distributing resources and how?

Mr. **Trott**. I can get you the exact figures for the FBI, which of course, carry the major burden of investigating white-collar cases for the Department, if you wish. I do not have them at my fingertips.

Senator **Grassley**. OK. Well, I would like to have that, then. Thank you. Thank you for that.

[The aforementioned material was subsequently supplied for the record.]

FOLLOW-UP QUESTIONS FROM SENATOR CHARLES E. GRASSELY TO STEPHEN TROTT REGARDING CIVIL RICO

1) You stated in your testimony that granting immunity to a defendant in a hypothetical RICO case would not affect subsequent civil RICO liability.

My question concerns the effect a prior criminal conviction requirement will have on this and related situations.

If a prior conviction is required, would not a defendant who is given immunity from prosecution on all charges in a particular case be protected from subsequent civil RICO liability as related to those particular charges?

2) John Keeney, a deputy assistant attorney general, testified before a House Subcommittee in September 1985 that the burden of RICO suits on the courts is not that great and a prior conviction requirement would place "unhealthy pressures" on prosecutors.

I know of at least one case where the Court granted a potential plaintiff's request to hold a federal grand jury investigation in order to protect the potential civil suit.

Consequently, it seems to me that this kind of pressure on prosecutors and the courts will undoubtedly increase thereby clogging the courts and causing a real legal, as well as financial mess.

How would you respond to this potential problem?

3) Mr. Keeney also testified that civil RICO suits "may have had a greater deterrent impact than is commonly recognized."

a) Was Mr. Keeney wrong?

b) If so, why is Mr. Keeney wrong, and in what way?

4) In a July 22, 1986 letter to Congress, Mr. John Bolton, assistant attorney general for Congressional Affairs, stated that "Persons who engage in serious fraud can be, and frequently are, prosecuted for criminal offenses."

a) Mr. Trott, with fraud in this country estimated at a cost of between fifty to one hundred billion dollars annually, I would appreciate it if you could provide me with copies of statistics or any other evidence on which Mr. Bolton based his statement that major fraud is frequently prosecuted.

b) What does "frequently prosecuted" mean?

c) Even though fraud may be prosecuted, it may not be effectively prosecuted, resulting in non-convictions, which would again limit subsequent civil RICO actions if a prior conviction is required. Do you agree that this is a potential problem?

5) It also appears that if a witness has a potential civil RICO claim against a defendant that the witness would have more of an interest in the defendant being convicted and his testimony may therefore be tainted. So, a prior conviction requirement could create an unintended incentive for a witness to testify against a defendant, and on the other hand negatively affect the prosecution by creating impeachable witnesses.

Mr. Trott, how would you respond to these likely problems that a prior conviction requirement would create?

6) Once again, I would appreciate an explanation of how conditions have changed from last year to warrant the Department's switch from opposing a civil RICO prior conviction requirement to supporting it now. Was the Department wrong the first time or is it wrong now?

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

AUG 29 1986

Honorable Charles E. Grassley
Chairman, Subcommittee on Administrative
Practice and Procedure
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your letter dated August 20, 1986, submitting additional questions in connection with the recent hearings regarding my nomination to be Associate Attorney General. My responses to your questions are as follows:

1. It is not true that a prior-conviction requirement would necessarily prevent a plaintiff from filing a civil RICO suit against an individual to whom use immunity has been extended under 18 U.S.C. § 6002. The "immunity" conferred by that statute is only use, not transactional, immunity. It does not prevent the person to whom it is granted from being prosecuted unless that person is also promised that he or she will not be charged. On many occasions our federal prosecutors seek post-conviction use immunity for a defendant who refuses to cooperate against his co-conspirators. Because such a defendant was convicted prior to being immunized, he still could be sued under civil RICO, assuming all other requirements of a RICO cause of action could be met. However, no appreciable number of worthwhile RICO suits would be foreclosed simply because one or even several potential defendants in an investigation had been compelled to be witnesses and also were the beneficiaries of non-prosecution agreements. For one thing, before the Department of Justice approves an immunity request, the effects of the compulsion order on subsequent proceedings are carefully weighed in deciding whether to grant authorization. For another, a use immunity order is almost invariably directed against an individual whose culpability in the crimes under investigation is minimal in comparison to the crimes of ringleaders against whom testimony is being sought. Ordinarily, use immunity and non-prosecution agreements are extended only when it is necessary to do so in order to obtain a conviction. When the leader is convicted, a civil RICO suit against him would be both appropriate and available.

Finally, almost every criminal act constitutes a tort or fraud under state or federal law, thus entitling the victim to sue a defendant for damages independent of RICO. Enacting a prior-conviction requirement would decrease the number of civil RICO suits, but nearly all injured plaintiffs would still have substantial state or federal remedies. Moreover, when the federal government convicts a defendant under criminal RICO and forfeits his illegal profits, a third-party victim can claim an interest in the forfeited property under 18 U.S.C. § 1963(m), or can petition the Attorney General for remission or mitigation of the forfeiture under § 1963(h) and (i).

2. Although potential RICO plaintiffs may seek to pressure Department prosecutors to bring criminal RICO cases against a defendant in order to satisfy the prior-conviction requirement, we believe that our normal pre-indictment RICO review process

will weed out RICO cases based on inappropriate considerations. No legislative solution to the civil RICO problem is perfect, but the prior-conviction requirement appears to be the least onerous solution that has been proposed. Our prosecutors are accustomed to considerable pressures exerted by defense attorneys and other persons who are opposed to or are pushing for prosecution for all sorts of reasons. Occasionally, those pressures are extremely strong, sometimes involving personal attacks on the integrity of prosecutors. Our system is set up to give all such pressures the proper weight, but not undue weight. We are confident that we will continue to make responsible prosecutive decisions--based on the admissible evidence--without yielding to improper external influences.

With respect to the case mentioned in your question in which a potential plaintiff obtained a court order requiring the government to present information to a grand jury, that was an unusual situation arising under a particular statute, 18 U.S.C. § 3332(a). That provision requires a government attorney, upon request, to relay information concerning a federal criminal offense to a special grand jury that was impaneled under 18 U.S.C. § 3331. Such a situation can arise in any context in which a person feels an investigation is warranted, not merely in connection with a potential RICO suit. If this provision should prove to create undue problems for prosecutors and grand juries, the solution may be to amend the provision.

3. In his testimony before the House Subcommittee on Criminal Justice in September 1985, Deputy Assistant Attorney General Keeney said that private civil enforcement "may have had a greater deterrent impact than is commonly recognized." At the time of Mr. Keeney's testimony, the Department was in the process of evaluating the storm surrounding civil RICO reform. Mr. Keeney's statement was correct when he made it, and it is still correct, when viewed in context. Shortly before that particular statement, Mr. Keeney said: "[I]n gauging the overall deterrent value of auxiliary enforcement by private plaintiffs, the deterrence provided by the mere threat of private suits must be added to the deterrence supplied by the suits that are actually filed." As Mr. Keeney suggested, the value of the private RICO cause of action may not lie solely in the cases that are brought. The threat of treble-damages recovery conceivably has deterred some potential wrongdoers from committing RICO violations. Obviously, such deterrence is difficult, if not impossible, to measure. In the final analysis, however, the intangible impact of deterrence, which ultimately could not be accurately assessed, was outweighed by the overuse of civil RICO in connection with ordinary commercial disputes that has continued unabated since Mr. Keeney's testimony twelve months ago.

4.(a) You have asked for "statistics or any other evidence on which Mr. Bolton based his statement that major fraud is frequently prosecuted."

The available data in the Department's Docket and Reporting System (which does not include data on environmental, tax or antitrust cases) indicates that the included white collar crime prosecutions rose as a percentage of total federal prosecutions from approximately 10 percent in the early 1970s to about 20 percent in 1980 and thereafter. The average number of federal white collar crime prosecutions brought annually for the past five years is approximately 5500, up slightly from about 5300 during the previous five-year period.

The number of incarcerated white collar offenders has also risen. Since 1980, the number has risen by 68%, and the number of fraud and tax offenders incarcerated has doubled.

Apart from mere statistics, the extent of the federal effort to prosecute major frauds is illustrated by a compendium of cases prosecuted in 1985 which was submitted to the Senate Judiciary Committee in connection with testimony of former Deputy

Attorney General D. Lowell Jensen on February 27, 1986. Enclosed for your information is a copy of that compendium, which includes summaries of over 300 representative white collar crime prosecutions handled by the Department last year.

(b) You ask what "frequently prosecuted" means.

In the context of the Department's efforts in prosecuting major frauds, we use the term "frequently prosecuted" to mean that we have brought a substantial number of significant cases, as is illustrated by the enclosed set of case summaries.

(c) Your letter also suggests that ineffective prosecution of fraud, resulting in non-convictions, would limit subsequent civil RICO actions if prior convictions were required. Of course, not every prosecution results in a conviction. In such cases, as noted above, private plaintiffs likely would have civil remedies other than RICO, and the government could still pursue a civil RICO action in addition to any other available remedies. Thus, we do not view this potential circumstance as a significant source of problems for victims of major frauds. Moreover, as our record demonstrates, the Department of Justice has been consistently successful in securing fraud convictions.

5. We do not foresee major problems arising from the bias of witnesses in criminal cases who may be contemplating future RICO claims against the criminal defendants. For one thing, this sort of bias could arise only in cases in which the witness had been injured in his business or property by reason of the RICO violation and in which there was a realistic possibility of recovery from the defendants. Although we have no statistics in this area, our experience has shown that relatively few government witnesses in criminal RICO prosecutions would qualify as successful RICO plaintiffs. In those cases in which the witness was so injured, moreover, he almost always will have some state or federal civil remedy other than RICO. And, even if the prior-conviction requirement were not added to RICO, a criminal RICO defendant could argue that a victim-witness is biased because the victim hopes that a conviction will make a subsequent civil RICO suit more easily won. Thus, we do not believe the enactment of the prior-conviction requirement will create any significant new problems with respect to the credibility of witnesses in federal RICO prosecutions.

6. With respect to the perception that the Department's present position on civil RICO represents a "switch" from its position in September 1985, we do not agree that any such "switch" has occurred. At the time of Mr. Keeney's testimony in 1985, we were continuing to evaluate the various considerations and alternatives. Mr. Keeney's testimony provided insights into the process of evaluation, in response to a Congressional request for testimony. We were not at that time prepared to offer our final conclusions with respect to RICO amendments, and we did not do so. Mr. Keeney provided a balanced discussion of the concerns on both sides of the civil RICO controversy, and stated that the evaluation process was continuing. In his conclusions, Mr. Keeney stated that "it may be premature" to enact a modification such as a prior-conviction requirement without further study. We concede that our assessment of the extent of civil RICO overuse has changed since last year. Clearly, as the Supreme Court suggested in Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275 (1985), something needs to be done to regain control of the statute. The prior-conviction requirement is a step in that direction.

I hope that these responses provide the information you require.

Sincerely,

Stephen S. Trott
Assistant Attorney General
Criminal Division

Mr. TROTT. What we are coping with is an FBI brought into the drug war for the first time in 1982. If you track the number of FBI agents, from the beginning of this decade until now, you will find, with the exception of drug cases, essentially a straight line.

The drug cases that the FBI took on, which now absorb 1,000 person-years in terms of investigation, have taken away from some of the other programs in terms of people available.

Not in terms of priority, or the kinds of cases we have been investigating, but that is one of the areas that we paid attention to, was to begin to rebuild the strength of the FBI in white-collar cases, and again remembering that their highest priority in that area is defense procurement fraud.

Senator GRASSLEY. Let me go just to another area now, and I alluded to this a little bit in my complimenting of you.

It has been very difficult for those of us charged with oversight of the Justice Department to get any kind of full and accurate picture of your current enforcement efforts, and part of this is because of secrecy surrounding criminal investigations.

Often, our only choice is to rely upon the Department's explanations, or to wait years for our review of some cryptic documents. With the door so tightly closed on almost all of the Justice Department's activities in this area, there is, from my judgment, very little chance of accountability.

I am a firm believer that a good dose of accountability is healthy for any institution, especially those whose salaries are paid by the taxpayers.

And just as those of us in Congress are held accountable, periodically, I believe a faceless bureaucracy, including even prosecutors, should be held accountable for their actions and decisions.

So I would like to ask you, what can you do in your new position now, thinking of new responsibilities, to ensure accountability among the taxpayers' prosecutors?

Mr. TROTT. Senator, as I have told you in our private discussions, I will remain available to come over and talk to you at any time about cases, and to share with you to the extent that that is possible, what is going on in our enforcement programs.

We appreciate your interest. We think we have a good record. We do not think we have a perfect record. We always think we can do better.

But I will remain available, at your request, to come over and give you full review of what the programs that we have are, and also, we do appreciate your ideas.

You are correct in nothing that sometimes a Department becomes hide-bound and good ideas can come from the outside. We do not have a closed mind, and anybody who comes to us with a good idea on how to do a better job, we would be willing to listen to.

Senator GRASSLEY. Well, you know, I do appreciate that opportunity, kind of one-on-one discussions, but I think maybe that it also begs some changes in institutional approach, and how the institution itself looks at this availability of information to Congress, for our purpose of accountability or oversight.

And beyond what you just said, is there anything that you could do, or, would you, at least if you do not have any ideas now, unless you believe that there is absolutely nothing in that area that can be done, give a review of it. Because your willingness to come to me is one thing; that speaks of you as an individual.

But I think that is short-term, as long as Mr. Trott, or Senator Grassley happen to be in the public domain.

But there is an institutional problem that I think we have to look at, and I do not mean the type of institutional challenge that Congress is giving to the Justice Department, like on the Rehnquist papers, as an example. But particularly where cases are closed, and where we are not talking about advice to the president. Do you see any changes that can be made in that area to facilitate our oversight?

Mr. TROTT. Senator, we have tried to be very forthcoming on closed cases. We still have a problem, as I know you recognize, with matters involving grand jury secrecy, but with the exception of that, to the extent we can, we will continue to try to be as forthcoming as possible about the cases in which you are interested.

The last case, for example, that we have been talking about, the *Sperry* case, I have offered to come over and talk to you about that case, at your convenience, and we will continue to maintain that attitude.

Senator GRASSLEY. Yes. And let me suggest, on that specific case, that you have been very forthcoming in letting us review some of the things, and we have not continued that discussion with you because we wanted that to be very timely, when this committee was going to continue its oversight. And that has been held in abeyance. So we have not forgotten that offer. Probably, you have not been told why we have not followed up on that, but I did want to make that clear.

Could we——

Mr. TROTT. If I may add one thing, Senator.

Senator GRASSLEY. Sure.

Mr. TROTT. It is never our intent to withhold information from Congress. We have absolutely nothing to hide in that respect, and ought to be accountable for the business that we perform, especially since we are getting paid by the taxpayers.

It is only in those circumstances where we are driven by something, such as a Federal law, that we feel constrained, not to withhold information, but to abide by the laws that say certain information cannot be turned over. With that exception, we want to be as open as we can.

Senator GRASSLEY. Well, you did not respond to my suggestion that maybe there ought to be some institutional changes.

But along that line, could we have a gentlemen's agreement to work together on a study or a review of accountability of agency prosecutors?

Mr. TROTT. Certainly.

Senator GRASSLEY. Now I would like to turn just a little bit to a role I played as a member of the Subcommittee on IRS Oversight, which involved some review of government employment and discipline in the prosecution of taxpayer cases.

This is in regard to the *Omni* and *Kilpatrick* cases. One of the disturbing issues that came up in this IRS Oversight Subcommittee on the issue of taxpayer abuse, was the results of hearings concerning the operation of the Office of Professional Responsibility. There is overwhelming evidence, that in those two cases, the *Omni* case and the *Kilpatrick* case, Federal Government prosecutors overstepped their ethical and perhaps legal boundaries prosecuting cases.

Apparently the Office of Professional Responsibility has investigated these matters. The problem is that no one knows what was determined by these investigations and apparently, no one ever will.

I mean, that is what we have been led to believe. I would like to ask, Mr. Trott, how is the public, or the Congress, going to have confidence in the tax collection system when alleged abuses go unanswered. Now I understand that Federal judges made these allegations and it is not just a politician like me speaking about the alleged abuses.

Mr. TROTT. Senator, the Office of Professional Responsibility does not report to me in my present position in the Criminal Division, and it never has.

I do not know to whom it will report in the structure that will be set up if I am confirmed to be the Associate Attorney General.

Mr. Meese has not decided that yet, recognizing that it is up to the Senate first to confirm me. So I have somewhat of a difficult time answering your question because I am just not familiar with OPR. I do know that Mr. Sheheen, who runs the Office of Professional Responsibility is a highly respected person. They have a good record. But he once explained to me reasons why most of the, or many of the investigations that they conduct must remain private. It would be up for him to explain that, again, to you.

But I also know that the Office of Professional Responsibility, when it finds evidence of wrongdoing, takes disciplinary action and goes even so far as to bring criminal prosecutions against people.

I certainly cannot comment on it right now because it is an open case and you know our position on open cases, but there is a prosecution in the District of Columbia against an FBI agent for activities that the Office of Professional Responsibility said violated the law.

So I do have confidence that when confronted with a matter requiring discipline, that that discipline will be recommended by OPR and enforced, and if it is a matter involving prosecution, that the same will follow.

Senator GRASSLEY. OK. Well, can you answer for me why cannot the results of these investigations at least be turned over to Congress?

I mean, I am not talking about making them public, in the sense of giving them in a press conference. I am talking about turning them over for our oversight.

Mr. TROTT. Again, Senator, I have not been directedly involved in OPR, and I am simply not completely familiar with the OPR's reasoning in regarding some of their information as private.

Senator GRASSLEY. Let me go on to another matter. I may want to come back to that. Just a minute.

[Pause.]

Senator GRASSLEY. I think I am going to leave that, except to say that when this structure is formalized, or whatever shifting takes place, would you get back to me on that point.

Mr. TROTT. If it reports to me I would be delighted to, and I am certain that if it does not, Mr. Burns, now the Deputy, will also be pleased to be able to discuss this with you.

Senator GRASSLEY. Now, I would like to visit with you about RICO. I am interested in the Department's new position on requiring a prior criminal conviction of certain civil RICO actions.

As you know, the Department strongly opposed this approach to reform last year but has switched its position. I would like to know what conditions have changed in the civil RICO area from last year, to the present, that warrants such a radical change in position of the Department.

Mr. TROTT. Senator, I believe it is currently the position of the Department that civil RICO should be a legal device available really only to the Federal Government, or, if the Congress sees fit, in its own wisdom, to State governments, such as, for example, through the attorney general of the State.

A review of civil RICO, over the years, has produced, in our judgment, many cases where it has been abused in civil litigation. It has become a civil fraud statute. And all of a sudden you have something that starts out as a legitimate business dispute and it turns into something charged as a racketeer-influence corrupt organization in court.

As I call it, that is a sort of a thermonuclear title, that I think far exceeds the type of activity that it supposed to attack. It was originally conceived as a way for private individuals to participate in the fight against organized crime.

It was the sincere belief—it is still held by many—that by opening the doors of the Federal court to civil lawsuits, private litigants could bring lawsuits against organized crime.

The problem with that is that private litigants do not have the resources, or the determination to bring civil lawsuits against organized crime, and instead, the bar has found ways to use this against business people in disputes.

So it is our feeling that this is an area that ought to be left to governments to prosecute.

Senator GRASSLEY. OK. But is not your statement now, of where the Department is on the legislation pending? What my question referred to is why the switch from where you were last year to where you are this year?

Mr. TROTT. These are very hard questions. We recognize that the legal system ought to make available all possible tools to attack corrupt organizations and especially racketeering conducted by organized crime around the country.

We continue to examine this and we continue to believe that it is a remedy that has been abused far too often by civil litigants, and we therefore believe it ought to be pulled back so that it only attacks those types of organizations originally intended by Congress.

Senator GRASSLEY. OK. Well, then along that line, I want to go on to one of the arguments used in support of a prior conviction requirement, which is that Congress intended civil RICO to be used against organized crime, and that fewer than 10 percent of the private civil RICO actions have been based on what is ordinarily considered organized crime.

So that brings the obvious question, I would like to have your thoughts on what ordinary organized crime is, then.

Mr. TROTT. Well, I do not know what ordinary organized crime is.

Senator GRASSLEY. Well, I mean, I am really taking the arguments that have been used by the Department, you know, and that is their basis for some change of view on this legislation in the last year.

Mr. TROTT. Again, I can only tell you that we have continued to examine this, and, originally, there was a substantial body of opinion in the Department that we ought to leave it alone. That there had not been enough time to see whether this statute would work, and maybe it would in fact be used in the way originally intended by Congress.

But as we continue to review the evidence and as we continue to gather information on cases and listen to the testimony, we become more and more convinced that it is something that is abused far more often than it should, and therefore it ought to be restricted in its application.

We intend to continue to use civil RICO, by the way, in the Government, against legitimate organized crime families. In New Jersey, we recently concluded a civil RICO prosecution against a labor union that had been infiltrated and taken over by organized crime.

In New York City we have filed another similar lawsuit and I cannot go into details, but we are planning more around the country. We intend to step up our use of this tool as an anti organized crime measure.

Senator GRASSLEY. Well, I guess the bottom line of my point of view is, we have to stop thinking in terms of organized crime as just the mob, I mean, as we have traditionally thought of the so-called mob. Fraud, in this country, has considerable costs, estimated to be $50 to $100 billion a year, and of course besides the financial costs, there is the potential cost to national security and human life.

These so-called white-collar crimes are committed by organized legitimate entities such as banks, defense contractors, and others, that have been infiltrated by what amounts to the common criminal. And there is no doubt in my mind that this is organized crime.

The President's Commission on Organized Crime has stated that organized crime in some way reaches virtually every major industry in America.

So, the game has changed since 1970. We do not refer to it, or, you know, we cannot refer to it any more as just the so-called mob. It is the use of legitimate business by organized crime.

It involves the most sophisticated business people, and I think that we need to clamp down on these criminals in every conceivable way that we can, and that should include both the use of criminal and civil remedies to accomplish the goal.

Mr. TROTT. Senator, the area that you have just described is an area in which we do not use civil RICO. We use criminal RICO in those areas. Where we find crimes and corrupt organizations like that, we utilize primarily criminal RICO prosecutions.

Senator GRASSLEY. But I am talking about the higher standard of proof, of criminal activity to get a conviction. You know, the use of civil RICO, with its lower standard of proof, is another tool that we ought to make as much use of as we can against white-collar crime.

Mr. TROTT. I agree, and we are using that more and more every day.

Senator GRASSLEY. Well, let me ask you: do you see any problems with requiring a prior criminal conviction?

Mr. TROTT. No; I think if that is an element of the offense, it is something that, once established, can be easily coped with. I mean, there will be a prior conviction or there will not. It will reduce the number of civil RICO cases brought by private litigants substantially.

Senator GRASSLEY. Then let me ask you: why will not a defendant plead guilty to non-RICO criminal counts to avoid civil RICO liability? That is going to be a pattern, is it not?

Mr. TROTT. Well, they might try, but our objective in settling cases is to not let people off the hook. When we file RICO it is because we mean it, and unless there is some problem with a case that makes it impossible to get a conviction on RICO, it is our intention to force a conviction: either plead guilty to RICO or go to trial.

I might add, that up until about 1980, RICO was not used very often. We are using it now every day. I have people in the Criminal Division who do nothing but review RICO cases and approve them all over the United States, and not just for traditional organized crime, but in many, many areas, so that we can continue to wipe out the criminal organizations that you have described, that are not traditional organized crime organizations.

Senator GRASSLEY. What about defendants seeking, and getting immunity from prosecution for various reasons, and then be protected from civil RICO liability?

Mr. TROTT. Do you have any specific examples of that?

Senator GRASSLEY. You know, that is a possibility, a very real possibility.

Mr. TROTT. Well, no, I do not believe it is. When we give somebody immunity in a criminal case, that in no way extends immunity to that person in a civil case, and any litigant who wants to bring a lawsuit against that person for a civil wrong can.

I also must indicate that the State court system is fully available in which people can sue for fraud in which they are damaged. It is not only the Federal system that we have to look to but many States now have passed their own RICO laws, but I can tell you categorically, that giving immunity to somebody, which is nothing more than use immunity, confers no civil immunity on that person.

Senator GRASSLEY. Thank you very much.

Mr. TROTT. You are welcome, Mr. Chairman.

Senator GRASSLEY. Mr. Weld.

FURTHER TESTIMONY OF WILLIAM F. WELD, TO BE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Senator GRASSLEY. Mr. Weld, I am asking questions that the chairman would have asked.

Mr. WELD. Yes, Senator. I was in the middle of an answer to the chairman's first question.

Senator GRASSLEY. You can continue.

Mr. WELD. Can I complete that?

Senator GRASSLEY. Yes.

Mr. WELD. And perhaps just to review that briefly because it touches on an area that it seems is of interest to yourself.

Senator GRASSLEY. Yes. And I will also have one or two questions of my own, but go ahead.

Mr. WELD. Good. The chairman asked me what would be my priorities, or areas that I would seek to emphasize, to the extent that I would be setting policy at the Criminal Division, if confirmed.

As I mentioned, I think that the combination of narcotics and organized crime is probably the biggest single problem and will absorb most of my time, or more than any other single set of issues.

But there are two areas that I have devoted a lot of attention to in Boston, that I would expect to continue to do so here. Those are public corruption and white collar cases. I think that I will also be spending time to ensure that there is a coherent national program with respect to the pornography problem, and my thought there is not simply child pornography, but to the extent that we can, let us make sure that we "go hunting where the ducks are" for adult pornography, and problems in that area as well.

There are two highly sensitive areas that are covered from within the Criminal Division, terrorism and espionage, and I can only hope there, that I could try to keep up the work that Mr. Trott has been doing.

I spent a great deal of time in the last 5 years, as a U.S. attorney, engaged in cooperative efforts with State and local law enforcement officials, many of which have resulted in significant indictments in areas such as arson, police corruption, waves of bank robberies.

There is a lot that can be done if the skids are kept smooth to help, for the Feds to help State and local law enforcement officials to do their job with more "bang for the buck."

So I would continue to be active in that area as well, I would hope.

Senator GRASSLEY. Mr. Weld, it seems that many drug dealers, when arrested, are able to pay bond money very easily, and then in some cases, even leave the country, and they would then resume their illegal activities elsewhere. I am sure that during your tenure as U.S. attorney that you have probably experienced such incidents.

What, in your opinion might be done, to deter this type of activity, and maybe some allusion to your leadership in that area?

Mr. WELD. Senator, prior to the passage of the 1984 crime bill, we have some horrendous instances in the district of Massachusetts with major narcotics figures skipping bail prior to trial, not showing up for trial, not showing up for arraignment and fleeing the country, and as the Senator indicates, they have the wherewithal to finance extensive travel.

I think the best medicine that could possibly have been prescribed for this problem is the pretrial detention provisions of the

1984 Crime Act, whose constitutionality, I am proud to say, I argued personally before the First Circuit Court of Appeals, because I thought the provision was of such importance.

That statute has made a major difference, in my opinion, to the government's ability to hold major drug traffickers prior to and subsequent to trial, and the drift of the law in that statute, and in a provision of the McClure-Volkmer bill which recently passed, increasingly is to recognize that narcotics offenses are dangerous, violent offenses, that they involve a threat to the community. And I think the 1984 Crime Act is probably the most important thing that could have been done, and my hope is that that problem, severe as it was in the early 1980's, is not going to be so severe in the future, if that statute will be rigorously applied.

Senator GRASSLEY. Mr. Weld, the committee will hear testimony today to the effect—presumably from the next witnesses—that you had a conflict of interest in criminal prosecution and plea agreement reached in a case brought against the Bank of Boston for failure to file currency transaction reports.

The allegations related to your family's business interest. I would like to have you comment on that allegation.

Mr. WELD. Yes, Senator. Thank you. By way of procedural background, I believe the complaint is raised by supporters of Presidential candidate Lyndon LaRouche.

In October 1984, and November 1984, numerous complaints were made to the Federal Bureau of Investigation in Boston, many by elderly alleged victims, of credit card fraud abuse. The allegation was that these complaining individuals had had unauthorized credit card charges of $500 or $1,000 placed on their credit card in favor of the Presidential campaign of Lyndon LaRouche. They seemed to be nonfrivolous allegations and it is now public knowledge that a grand jury was impaneled under my direction to investigate these charges. In April 1985, the LaRouche organization sent a letter to Attorney General Meese seeking to have me removed from supervision of the grand jury investigation.

The matter was referred to OPR and the Justice Department, which conducted an investigation, found no support for the allegations, and closed the matter in October 1985.

In August 1985, the LaRouche organizations brought a mandamus action against Attorney General Meese, again, seeking to have me removed from supervision of the LaRoche grand jury investigation on grounds, I believe, of bias and prejudice as well as conflict of interest.

That case was filed in the District of Columbia, and it was dismissed, with prejudice, on the Government's motion, in February 1986.

So there have been those two airings of this allegation, to date. The Boston grand jury investigation has become a matter of public record because the LaRouche organizations failed to produce documents in response to subpoenas issued by the grand jury there, and we filed a motion to have them held in contempt of the grand jury subpoenas, and there was a hearing before the Federal judge in Boston.

They were found in contempt and the judge assessed monetary penalties. They appealed that judgment to the First Circuit Court of Appeals, and the judgment was, a judgment of contempt and fines was recently affirmed. The LaRouche organizations have filed a petition for rehearing, which was denied, I believe, only a week or two ago, by the First Circuit Court of Appeals in Boston.

So I am hopeful that there will be compliance with the grand jury's subpoenas, at this point, and we can attempt to have the grand jry reach a resolution of the inquiry that it has been conducting. It has been, frankly, frustrated for much of the last 2 years by the noncompliance with its subpoenas.

On the merits of the allegation raised by the LaRouche entities about a conflict of interest in the *Bank of Boston* case, that was a case in Febrary 1985 involving a violation of currency reporting laws and there was a fine of $500,000 which was, at that time, the largest criminal fine ever imposed for a violation of title 31, the currency reporting law.

I think the case has been very salutary in promoting compliance with the financial reporting requirements of title 31. I know that compliance is up fourfold since the time of that case.

As to the complaint of conflict of interest, as I understand it, Senator, the allegation is that my action in that case was tainted or could have been perceived to have been tainted because of a financial or family tie to one of several organizations: White Weld & Company, Credit Suisse, which is a Swiss bank, Clarendon Bank, Merrill Lynch, Credit Suisse/First Boston, and/or Bank of Boston.

I investigated the matter when it first came up in the letter to Attorney General Meese, and determined and informed Mr. Shaheen and Mr. Meese, that neither I, nor any member of my immediate family, nor any of my siblings, nor my mother, who is since deceased, has any financial interest in White Weld & Company, Credit Suisse, Clarendon Bank, Merrill Lynch, Credit Suisse/First Boston, or Bank of Boston. And I did check with both financial advisors and legal counsel for the family and ascertained that that is the case.

My father, the late David Weld of Smithtown, New York, was a general partner of the firm of White Weld & Company until his death in 1972. Since my father's death, my family has had no financial interest in the New York investment house of White Weld & Company. That investment house in fact was acquired by Merrill Lynch in 1978, and has since ceased to exist as far as I know, and in any event there has been no financial connection, even to the extent it has continued operations in Europe.

One specific point made in the submissions by the LaRouche organizations is that they claim there is a connection between Credit Suisse and the Bank of Boston, and White Weld, because Credit Suisse/White Weld changed its name at some point to Credit Suisse/First Boston.

However, I believe that First Boston is a New York firm and has no connection to the Bank of Boston. So I guess the short answer to the conflict of interest question is that there is no tie, personal or financial, for myself, or my family.

Senator **Grassley**. My next question, I think you did partially answer, but I think I should ask it as a specific question, and then have you go directly to this question, too, and it is very important that we have a very clear record here.

Another allegation against you concerns an ongoing grand jury investigation of the National Democratic Policy Committee, and other organizations identified with Lyndon H. LaRouche, Jr.

Mr. LaRouche is the chairman emeritus of the National Democratic Policy Committee. This investigation has been described by the National Democratic Policy Committee as "a fishing expedition."

So I would like to have you comment on that matter, if you can.

Mr. WELD. Senator, I can understand, frankly, how supporters of Mr. LaRouche might experience some frustration that the grand jury investigation, which has been a matter of public record for almost 2 years now, has not come to a conclusion. I do think that is understandable, and I assure you, and I assure them, that the matter has my full attention, and there is no intent, on our part, to have there be any delay in that grand jury investigation.

As I mentioned, however, there was ample predication for that grand jury investigation at the time that the grand jury began to hear evidence in late 1984. There were very specific complaints from a number of different people all over the country about credit card fraud. A number of the victims were elderly. The same pattern and modus operandi was described in case after case, not merely in my district. It just seemed vanishingly unlikely that this was all a coincidence, so I think there was ample foundation for the investigation.

Now the way, as the Senator knows, a grand jury investigation works, is the grand jury can subpoena either witnesses or documents, and in this particular case, because the allegations involve alleged fraud, much of which would be reflected in financial, credit card, election campaign-type records that the subjects of the investigation, the LaRouche organizations, would keep; in this particular case, provision of documents in compliance with a grand jury subpoena, is very important to the grand jury's investigation, and to its ability to determine whether there is probable cause to believe that a Federal offense, namely, credit card fraud, or whatever other offense it may investigate, has been committed. No documents, no ability for the grand jury to return a true bill, or a no bill, based on all the evidence. And it has been those documents, and refusal to comply with the grand jury's subpoenas for those documents, that all the shooting has been about for the last year and a half.

And that is the case which was fully briefed and argued before the district judge, David Mazzone, appealed to the first circuit, full argument in the first circuit—Judge Mazzone affirmed; a petition for rehearing—petition denied. And that has finally wound its course and ended a week or two ago with a denial of the petition for rehearing.

So as I say I am hopeful that, at this point, we can get on with it. But a "fishing expedition," no.

Senator GRASSLEY. Mr. Weld, a general question we ask every witness, appointee, I should say: Will you respond to requests to appear and testify before any duly authorized and constituted committee of the U.S. Senate?

Mr. WELD. Senator, I will, and I look forward to the opportunity to work with the Members of this body, if confirmed.

Senator **Grassley**. Then, for myself, an interest that you know from my questioning of Mr. Trott, that I have him, and I would like to ask you. You heard me express my concerns regarding defense procurement fraud in my questioning of Mr. Trott.

As head of the Criminal Division, of course you can have a great impact on that area of law enforcement. Can you tell me what plans you would have for improving the Justice Department record in this area.

Mr. **Weld**. As the Senator knows, these cases are labor intensive for the attorneys and the investigators. We have had in my district—and this really is not irrelevant to the question, it is a leadup to the direct answer, the experience I have had in the last few years. We have had six of those cases, two or three of which have gone to trial.

They have all been convictions. They are in different areas of defense procurement fraud. Several have been failure to test cases, where the company does not test a product that it says it is going to under the terms of its contract. Those are some of the most serious defense procurement fraud cases, I think, because they introduce a safety element.

I am happy to say, that when we recently convicted a Massachusetts company and two of its officers for failure to perform required tests on semiconductor chips which are used in space and weapons applications, the two officers received prison terms of 5 years and 3 years, respectively, and those are fairly good sentences, in my district, for a white-collar case. In another case of just the last couple of weeks involving failure to test the flash suppressor which goes at the end of the gun barrel of the M-16 rifle, and helps prevent the soldier from being exposed to sniper fire, again, a 12-month prison term was imposed by the judge.

The four types of cases with which I am familiar, Senator, are:

Failure to test.

Product substitution—I tell you I am going to give you product "A" and I give you product "B" which was made in the Far East and is much cheaper for me to secure.

Labor mischarging. These are the most complex of all to investigate because they are massive paper cases. I have a cost-plus contract and I have a fixed-price contract, and I take overhead that really should go into my fixed-price contract where I am running up against the ceiling, and I shove it over to the cost-plus, so that Uncle Sam and the taxpayers can pay for that, even though it is a separate contract and it should not be in there.

And the fourth area is defective pricing, and this applies not just to the defense area. This is a Government fraud priority.

Senator **Grassley**. You are telling me you have done cases in each one of these areas?

Mr. **Weld**. Yes, we have, Senator. Yes, we have.

Senator **Grassley**. OK. All right.

Mr. **Weld**. And so I am familiar—well——

Senator **Grassley**. No, no. I think now you are getting to what I wanted to hear.

Mr. **Weld**. I am familiar with the extent to which these cases require particular expertise, and the extent to which they are labor-intensive. I think there is something—I think there is merit in your suggestion of specialists in this area to be out in the field.

As Mr. Trott indicated, in major U.S. attorney's offices, that is de facto already the case. We have—our three most experienced fraud prosecutors in Massachusetts tend to attract these cases, and between the three of them, they have prosecuted all six of the cases that I referred to.

We have a major frauds unit. I suppose that is probably even more true in Los Angeles, and probably equally true in San Francisco, which are also districts with a big defense presence.

But there is no substitute for expertise here. If you have to reinvent the wheel when you get a labor misallocation case, there is a lot of ramp-up time, there is a lot of starting time.

Something that has been done: in recent years I know that there was perceived to be a problem with a backlog of IRS cases around the country, and last year, 22 assistant U.S. attorneys were assigned out to the field with IRS strings on them, name tags on them. "I am a prosecutor who does only IRS backlog cases." It seems to me that something like that might have merit, additional assistant U.S. attorney positions who would have—who would be charged, be under the direct supervision of the U.S. attorney, but they would be sent to districts with major defense contractor presences, and they would be charged with prosecuting defense contracting cases.

You can do that, and that avoids what I think—I would agree with Mr. Trott, that the program that existed in the late 1970's, where there were economic crime specialists answering to the Criminal Division in Washington, who were seeded out in various U.S. attorney's offices, including mine.

That program really did not do the trick, but I think a placement of specialists around the country would have great merit.

Also, I think we have to recognize that the need for expertise exists just as much on the investigative side as it does on the attorney side, and I have had a conversation with Joe Scherick, as a matter of fact, who is over at the Defense Department, and he asked several U.S. attorneys, myself included, would you like a flying squadron of 25 attorneys to come and help you with defense procurement cases in your district? My answer, in all candor, was, that if you could give me 25 agents who were fraud agents, who were not, you know, trained in an accounting way to focus on, you know, time and attendance violations, who did not have a quota of irregularities they had to report every month, who had their eye on the big picture, who would receive saturation training in fraud spotting—I think 25 agents would be more valuable than 25 attorneys because there are a lot of attorneys out there who can handle the big paper cases, but the—you know, the first person through the door reviewing the books of the defense contractor is not the assistant U.S. attorney.

It is the agent from DCIS, DCASR, NIS, OSI, for the Army, and I think that is absolutely key. So what I would do would be to spend as much time as I possibly could—and as I say, white collar and public corruption are my private agenda items, not taking anything away from narcotics and organized crime, but they are areas that I know I am going to spend personal time on—I want to sit down with the military investigative services, and say, "What can we do with agent training to help these people be really fraud agents? Do you want us to place assistant U.S. attorneys around the country who will do only defense cases? What is your inventory? What will the market bear?"

Senator GRASSLEY. I think you might be starting to address right now another question, probably my last question, and that is, in these hearings before my subcommittee, we have heard of lack of cooperation, or, you know, a major problem is lack of cooperation between investigators and prosecutors.

So what could you do maybe to correct that problem, if you see it as a problem? And I think you just indicated you did see it as a problem.

Mr. WELD. No, I have not encountered any lack of cooperation between the investigative agencies and the prosecutors. What I was mentioning is that just the sheer manpower levels of the agents are very important, and you cannot send a single agent in to audit the books of a big contractor, and expect him to come up with a "smoking gun," if he has got six warehouses full of documents.

Senator GRASSLEY. Just a minute.

Mr. Trott, it is all right if you go, but I did want to say one last thing, and it is not a question you have to answer. But I do want to submit a few questions, in writing, on RICO, and a couple of other things, that if I could have an answer, in writing, before we vote on your nomination. I would like to—and also, too, I need to announce to everybody that, since not every member was able to be here, you might expect to receive questions in writing from other members as well.

Mr. TROTT. As soon as I get the questions, Senator, we will set out to answer them.

Senator GRASSLEY. Thank you.

Now back to my question to you. When I speak of lack of cooperation, I guess I have heard people within the IG's Office of DOD, saying well, the problem is over there in DOJ. And then when we have people from DOJ in front of us, there is some inference the problem is at DOD, that there is not adequate investigation in the IG Office of DOD.

You say you do not see it as a problem?

Mr. WELD. Well, no, we have not had it as a problem in Massachusetts.

Senator GRASSLEY. OK.

Mr. WELD. I cannot speak to nationwide. But no substitute for sitting down with all the IG's and saying: what do you people want? What can we do differently? But I would kind of, in terms of——

Senator GRASSLEY. You would see yourself, then, doing that?

Mr. WELD. Absolutely, Senator. Yeah. I would start with a definition of the problem and try to look where the big defense contractors are, and if there are no fraud referrals in those areas, I would say maybe that is something we need to tinker with.

Senator GRASSLEY. From our standpoint of oversight, the extent to which I could be involved in that process, I would like to, and I do not mean a legislator doing an executive function.

I mean from our understanding of what the problems are, and what we see as maybe some solutions. I would like to be involved.

Mr. **Weld**. I think that would be very helpful, Senator, and as I often argue, I think that vigorous enforcement in the area of defense procurement fraud actually helps the military, because if the public and the Congress does not believe the money is being well spent, those military budgets are going to shrink.

Senator **Grassley**. On that very last point that you made, I remember, just looking at some polls on public opinion concerning defense waste and fraud as I was getting ready for my work on the defense budget. Earlier this year, and confirmed again just a few months ago, the same poll showed very definitely on the part of the public at the grassroots, a feeling of tremendous waste, and not just from fraudulent activity, but waste generally, some of it from fraud. And that is very basic to maybe the lack of credibility that people have in the defense budget, and the lack of support for the President's program of spending more money on defense.

So, you know, we all have a part in solving that problem. But if there is any one thing that is really going to solve it, and make the President's job of national security easier, as he sees that through the defense budget, it is what you do in Justice, in ferreting out this fraud and the punishment of it, and then the elimination of it. I think if we get more vigorous prosecutions, we are going to change behavior dramatically.

Maybe that is being idealistic on my part, but I think it can really happen.

Mr. **Weld**. I strongly agree with you, Senator.

Senator **Grassley**. Thank you very much.

Mr. **Weld**. Thank you, sir.

Senator **Grassley**. Our next witness is Mr. Warren Hamerman, and it is my understanding that he is chairman of the National Democratic Policy Committee, and sir, I would like to swear you at this point.

Would you raise your right hand. Do you swear that the testimony that you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Hamerman**. I do.

Senator **Grassley**. And also, according to the Chairman's rules, we would ask you to summarize your testimony in 5 minutes, and then your entire testimony will be submitted in the record. So would you proceed.

TESTIMONY OF WARREN J. HAMERMAN, CHAIRMAN, NATIONAL DEMOCRATIC POLICY COMMITTEE

Mr. **Hamerman**. I feel compelled to speak against the nomination of William Weld for Assistant Attorney General for the Criminal Division.

The President of the United States, in cooperation with other forces, nationally, and allied governments, internationally, has launched a major military war on drug trafficking. The war on drugs is rightly seen by the President as a combined major strategic national security and domestic initiative.

The same drug problem which is the target of our Nation's war mobilization is also a chief source of street crime inside the United States, a criminal problem which reaches to the highest levels of our society.

In this context, high Government officials with responsibility for the investigation and enforcement of Federal criminal statutes, relevant to the war on drugs, and to eradicating street crime, must be dedicated individuals who are completely beyond any personal suspicion.

Therefore, our citizens must be assured of the impeccable commitment of Department of Justice officials, particularly the Assistant Attorney General in charge of the Criminal Division, to carry out the President's war on drugs with vigor and with the highest regard for principals of law and justice. The impeccable commitment of the head of the Criminal Division is the issue before us today.

By this standard, Mr. William Weld of Boston is eminently unqualified to serve as head of the Justice Department's Criminal Division.

The position to which Mr. Weld aspires is of such importance that its occupant can personally determine the course of the President's war on drugs.

Mr. Weld's disqualifications are demonstrated by his poor performance in Boston on drug-related matters, and by his possibly questionable private links, and I must add, by his incredible obfuscation of the direct questions put before him today.

To appoint Mr. Weld would send a wrong signal to the international and domestic law enforcement and military community, whose soldiers are heroically placing their lives on the line to fight the war on drugs.

I believe that a full investigation of the following major areas—which I will summarize—of Mr. Weld's record and person must be thoroughly conducted, not in the form of a few questions, but a full scale investigation before the Senate Judiciary Committee can vote on his appointment.

These areas are: One, Mr. Weld's conduct with regard to drug-related and other criminal matters in Boston. Two, Mr. Weld's personal background, his private business affairs, and his methods of prosecution, which the First Circuit Court of Appeals, contrary to what was stated by Senator Kennedy earlier, that all of the judges in the Boston area approved of Mr. Weld's conduct—that the First Circuit Court of Appeals in reviewing Mr. Weld's conduct in the prosecution of the chief fundraiser of former Mayor Kevin White, on July 1, 1985, characterized Mr. Weld's methods of prosecution as bordering on the Soviet legal principle of crimes by analogy, or targeting the individual rather than the crime.

The four areas which I will summarize, that my testimony contains in detail about Mr. Weld, are: First, the area of Mr. Weld and his role in covering up the Bank of Boston drug money laundering matter.

In this instance, the Bank of Boston was caught in laundering $1.2 billion. Mr. Weld entered in a plea bargain arrangement with the Bank of Boston and merely fined it one-half million dollars.

At the time, the Assistant Treasury Secretary for Enforcement, John M. Walker, testified before a congressional committee, that the money in question, of $600 million in small bills that the bank took, was drug money laundering.

Senator Al D'Amato described the nature of the fine which Mr. Weld plea bargained for as, quote, "a pittance," and second, "an absurd four ten-thousandths of the money laundered."

In fact Mr. Weld could have, as the line of questioning which we provided gives ample leads for the committee to pursue, could in fact have investigated and prosecuted the Bank of Boston for every one of the 1,163 occasions of its unreported cash transactions.

He chose to only prosecute the one. We have provided several pages of questioning which must be looked into as to why Mr. Weld did this. Second is to the question of Mr. Weld's——

Mr. SHORT. Mr. Hamerman, your time is up. If you could summarize, please.

Mr. HAMERMAN. Let me just quickly address the other points. As to the question of Mr. Weld's conflict of interest, he testified here, today, that his father, David Weld, was a general partner of White Weld, a securities company with also an office in London, with a direct business relationship with Credit Suisse.

He said that he inquired of his financial advisers, whether he, or any members of his current, of his family who are alive, had a business relationship with them.

I have, which I would like to submit, as appended to my testimony, the financial disclosure report which Mr. Weld submitted in 1985, which lists six trust funds coming from the will of his father, David Weld, which were set up in the years 1976 and 1977. These six trust funds from his father's estate are all set up in such a fashion, that Mr. William Weld is the trustee.

And I would ask the committee to fully investigate what are the funds, are there Credit Suisse funds, and to look at the relationship of the Weld family trust.

Also in the line of questioning you will note that there are several financial concerns and businesses which are believed to be paying Mr. Weld, which do not appear in his financial disclosure statement.

Mr. SHORT. The document will be received without objection.

Mr. HAMERMAN. Second——

Mr. SHORT. Mr. Hamerman, we are going to have to stop. We have a meeting at 5 o'clock, and we are going to have to cease.

Mr. HAMERMAN. May I have just 2 minutes to finish and summarize?

Mr. SHORT. You can have 1 minute and that is all.

Mr. HAMERMAN. He did not answer to the two Bank of Boston officials who contributed to his attorney general campaign in 1978, nor did he answer to the fact that his cousin is in the law firm of the attorneys of the Bank of Boston.

I also would like to point out that the organization which I head, the National Democratic Policy Committee, has complied in providing evidence to the grand jury, which Mr. Weld initiated in Boston.

His peers in the National Law Journal, and the, as I mentioned before, the court of appeals, found fault with his methods.

I am confident that if this committee fully investigates the line of questioning provided in seven pages of questioning as well as my full testimony, that not only will William Weld not be appointed, but there will be new leads for the war on drugs. I urge the committee to decouple the car in which William Weld sits from the rest of the railroad train of appointments, which appear headed for expedited approval. Thank you.

Mr. SHORT. Thank you very much, Mr. Hamerman. Chairman Thurmond appreciates your testimony.

[The statement follows:]

Testimony In Opposition to the Nomination of William Weld for Assistant Attorney General for the Criminal Division of the United States Department of Justice

Submitted by:
Warren J. Hamerman, Chairman
National Democratic Policy Committee (NDPC)

To:
U.S. Senate Committee on the Judiciary

August 13, 1986

My name is Warren J. Hamerman, and I have been the chairman of the National Democratic Policy Committee since its founding in August 1980. The National Democratic Policy Committee is a multi-candidate political action committee which has advocated and campaigned for a policy of an all-out War on Drugs since its inception; I therefore feel historically compelled to testify against the nomination of Mr. William Weld, currently the U.S. Attorney of Boston, to the fourth highest position in the U.S. Department of Justice.

The President of the United States in cooperation with other forces nationally, and allied governments internationally, has launched a major military war on drug trafficking. The War on Drugs is rightly seen by the President as a combined major strategic, national security and domestic initiative. The same drug problem which is the target of our nation's war mobilization, is also a chief source of street crime inside the United States, a criminal problem which reaches to the highest levels of our society. In this context, high government officials with responsibility for the investigation and enforcement of all federal criminal statutes, relevant to the War on Drugs and to eradicating street crime, must be dedicated individuals who are completely beyond any personal suspicion.

Therefore, our citizens must be assured of the impeccable commitment of Department of Justice officials, particularly the Assistant Attorney General in charge of the Criminal Division, to carry out the War on Drugs with vigor, and with highest regard for principles of law and justice. The impeccable commitment of the head of the Criminal Division is the issue before us today.

By this standard, Mr. William Weld of Boston is EMINENTLY

UNQUALIFIED to serve as head of the Justice Department's Criminal Division.

The position to which Mr. Weld aspires is of such importance that its occupant could personally determine the course of the President's War on Drugs.

Mr. Weld's disqualifications are demonstrated by his poor performance in Boston on drug-related matters and by his possibly questionable private business links.

To appoint Mr. Weld would send a wrong signal to the international and domestic law enforcement and military community whose soldiers are heroically placing their lives on the line to fight the War on Drugs.

I believe that a full investigation of the following major areas of Mr. Weld's record and person must be thoroughly conducted before the Senate Judiciary Committee can vote on his appointment: his conduct with regard to drug-related and other criminal matters in Boston; his personal background; his private business affairs; and his methods of prosecution, which the First Circuit Court of Appeals, in reviewing Mr. Weld's conduct, on July 1, 1985 characterized as bordering on the "Soviet legal principle" of "crimes by analogy."

MR. WELD AND THE BANK OF BOSTON DRUG-MONEY-LAUNDERING COVER-UP:

A serious misrepresentation of fact was created in February of 1985, when the public was led to believe that the felony conviction of the Bank of Boston for currency reporting violations represented a serious attack on money laundering. What actually took place was a monumental cover-up, orchestrated by William Weld.

Over a four-year period, the Bank of Boston ignored the law not once or twice, but 1,163 times, failing on each of those 1,163 occasions, to report cash transactions over $10,000. Former Assistant Treasury Secretary for Enforcement John M. Walker, testifying before a congressional committee at the time, said, "There is every indication that the $600 million of small bills that the bank took in was the laundering of 'drug money'... Why else would the money be in $20 bills?"

The Bank of Boston's violations could have cost it over $2 billion in fines and forfeitures. Instead, the deal struck by Mr. Weld fined the bank for a one-count felony, and protected any bank officials from prosecution. Senator Al D'Amato (R-N.Y.) described the fine against the Bank of Boston, as "a pittance," an absurd "four ten-thousandths" of the money laundered. The Bank's own annual report boasted that the prosecution would not have any serious effect on its profits.

Contrary to common belief, Mr. Weld never prosecuted the Bank of Boston for violations of the law that pertained to money laundering by the Angiulo organized-crime family. Kept out of the indictment was the fact that between 1979 and 1983 the bank sold $7.3 million in cashiers' checks to various members of the Angiulo family, among them 163 checks for $2.2 million in cash.

According to Weld's own financial disclosures, he is tied to both sides of the bank transfers willfully concealed by the Bank of Boston. In his 1978 unsuccessful bid for Massachusetts Attorney General, he received campaign contributions from two Bank of Boston officials: William C. Mercer, an honorary director, and Peter M. Whitman, senior vice-president. The other side is Credit Suisse, with which Weld has a direct family interest.

MR. WELD'S CONFLICT OF INTEREST

Among the most important of the Swiss banks involved in the Bank of Boston case is Credit Suisse of Zurich, Switzerland. A survey taken among law enforcement agencies of several Western countries by the journal Executive Intelligence Review, confirms that Credit Suisse may well be the "king" of Swiss laundromats. The bank was a recipient of the take from the famous "Pizza Connection" heroin-trafficking ring; Operation Greenback, the first major multi-agency federal investigation of drug money laundering, nailed Credit Suisse's Miami branch in repeated currency reporting violations; Credit Suisse was Robert Vesco's major bank in the days of Investors Overseas Services.

Credit Suisse has been the Weld family bank since at least the time when Mr. Weld's father, David Weld, was a general partner of the investment house known as White Weld, in 1948. White Weld

Securities is the basis of the Weld family fortune. The Weld family fortune's biggest venture at this time in the international markets is an outfit in London called White Weld Securities, the Eurobond syndication subsidiary of Credit Suisse First Boston, Ltd. Until 1978 it was known as Credit Suisse White Weld. During the summer of 1978 a baffling sequence of transactions took place among White Weld, Credit Suisse, Merrill Lynch, First Boston, Inc. and others. Merrill Lynch appeared to have purchased White Weld for the sum of $50 million. Subsequently, Credit Suisse purchased from Merrill Lynch, White Weld's stockholders' "stake" for $25 million. Afterward, Credit Suisse bought into First Boston, Inc. and First Boston bought into White Weld Securities of London. By the time the transactions were completed, the tangle became inpenetrable.

Estimates of investigators, among them the President's Commission on Organized Crime, are that annual revenues from the international drug trade are approximately $400 billion. Much of it is leveraged four-to-five-fold and is invested into purchase of options in the Eurobond market. This is a world market, 85% of whose activities is controlled by three financial institutions: 1) Credit Suisse White Weld of London; 2) First Boston Corporation of New York, and 3) Merrill Lynch of New York and London.

This evidence was brought before the Senate Permanent Investigations Subcommittee at the time of the Bank of Boston hearings last year, yet no action was taken. Similarly in February of 1985, the Caracas, Venezuela, daily "El Mundo" detailed how $12 billion of flight capital, much of it going through the Bank of Boston, had been identified. William Weld is reported to have a file of evidence presented in the El Mundo article. Yet nothing has been done. These are just a few of the cases.

MR. WELD'S QUESTIONABLE JUDICIAL METHODS

William Weld has a history of abuse of office and selective prosecution against political enemies, with which the residents of Massachusetts are all too familiar. He is a proponent of the school of prosecution that targets the individual rather than the crime.

The most celebrated case was the judicial murder of the political machine of former Boston Mayor Kevin White; the goal and end result--to prevent White from running for re-election. The sacrificial lamb in this series of indictments was White's chief fundraiser Theodore Anzalone, who was initially charged with extortion and, ironically enough, violating currency reporting requirements. Anzalone was acquitted on appeal. In its July 1, 1985 opinion, the Appeals court issued a sharp rebuke to Weld stating:

> "In contrast to what is permitted under other legal systems, the Constitution of the United States mandates that, before any person is held responsible for violation of the criminal laws of this country, the conduct for which he is accountable be prohibited with sufficient specificity to forewarn of the proscription of said conduct."

The court pointed to the principle of "crimes by analogy" in the Soviet legal system, and quoted from Article 16 of the Soviet Criminal Code which states:

> "If any socially dangerous act has not been directly provided for in the present Code, the basis and extent of liability for it is determined by applying to it those articles of the Code which deal with the offenses most similar in nature."

In other words, make the crime fit the would-be criminal. The government (i.e. Weld's office) was trying to "test the limits of statutory interpretation," said the court, and it should not expect the courts to "stretch statutory interpretation past the breaking point to accomodate the government's interpretation."

On June 13, 1983, long before the Appeals Court decision was made, the "National Law Journal" published an article describing William Weld's actions as a "textbook example of a prosecutor misusing his powers to bully witnesses and manipulate the political process."

It is exactly this method which has been used in the almost-two-year-long fishing expedition targetting my associate Lyndon H. LaRouche, Jr., through an alleged investigation of his 1984 campaign committees, and also the NDPC and other organizations Weld regards as "LaRouche-related."

As with other cases, the "sting" and the corrupt witness, are the food which feeds the beast. In fact, most recently Mr. Weld has chosen to use hardened criminals as his key witnesses.

The latest witness brought to testify against Mr. LaRouche and his associates is Mordechai Levi, a suspected terrorist and member of the Jewish Defense League who has personally threatened the life of Mr. LaRouche. Earlier this year, the FBI issued a report of terrorist incidents in the U.S., identifying "Jewish extremists" as the major domestic terrorist operation. One of the incidents named in the report was the murder of Arab-American Anti-Discrimination Committee leader Alex Odeh, who was blown up in a booby-trapped bomb, wired to his office door, in October 1985.

Two other incidents, the August 1985 bombing of Tscherim Soobzokov, which caused his death, and the September 1985 bombing of the home of Elmar Sporgis, both involved Mordechai Levi, who held public meetings calling for the two men's deaths shortly before the bombings. A special report issued by Executive Intelligence Review in March 1986 documents how Levi has served as a paid agent of the Anti-Defamation League, the American Jewish Committee and the FBI. In August 1985, two associates of Mr. LaRouche petitioned Attorney General Edwin Meese to appoint a special prosecutor to investigate the terrorist attack on Soobzokov, stating that since Levi was an FBI informant there would not be an objective investigation of his role in these assassinations. I wonder now whether Levi will be given immunity from prosecution in the Soobzokov, Sprogis and Odeh cases, in exchange for his perjured testimony against LaRouche?

Levi and the JDL are also suspected of planting a bomb that maimed for life a Boston police officer last year. But this is not the only complaint the city's officers have with Mr. Weld. He has been on a rampage against so-called "police corruption," using as his star witness one Jesse Waters, a convicted drug dealer and tax evader who shot and seriously wounded a Boston police officer who was attempting to stop Waters in a drug sale. Waters, now in the Federal Witness Protection Program, is providing evidence on bribery charges against Boston police officers.

Attached to my testimony is a seven-page document which lists the kinds of questions which need to be asked of Mr. Weld. If this committee upholds its responsibility and investigates these facts, prior to voting on this nomination, I am confident that not only will you deny the position to William Weld, but the results of the investigation will provide major new leads that will contribute to the rapid advance of the War on Drugs.

WELD CONFIRMATION HEARINGS - DOCUMENTATION

Listed below are suggested questions concerning areas of investigation the National Democratic Policy Committee wishes to be pursued by the Senate Judiciary Committee. With each group of questions, material, delivered under separate cover, is referenced, which documents the information and leads herein.

I. MONEY LAUNDERING AND THE BANK OF BOSTON CASE

FACT: William Weld let the First National Bank of Boston off the prosecutorial hook with a mere $500,000 fine, which the Bank's annual report says had little effect on their profits for 1985. The fine amounts to 1/20 of one percent of the illegal transactons.

CONTRARY TO COMMON BELIEF, WILLIAM WELD NEVER PROSECUTED THE BANK OF BOSTON FOR VIOLATIONS OF THE LAW THAT PERTAINED TO THE ANGIULO'S ORGANIZED CRIME MONEY LAUNDERING.

In addition to the $1.22 billion in unreported cash transfers, for which the Bank of Boston was prosecuted, between 1979 and 1983 the Bank of Boston sold $7,372,343 in cashiers checks to various members of the Anguilo organized crime family. These domentic transactions were never mentioned, or included in the bank's indictment. The government centered its case only on international transactions.

William Weld is financially tied to the Bank of Boston through Credit Suisse, one of the banks which was transferring large amounts of cash that went unreported under the provisions of the Bank Secrecy Act. Credit Suisse purchased parts of White, Weld Securities, the company owned by his father, David Weld.

A. Is it not the case that the Bank of Boston was found to have engaged in 1,163 currency transactions totaling $1,218,682,281 (over $1.2 billion) without reporting them under the Bank Secrecy Act?

B. On what basis was the decision made to prosecute the Bank of Boston for only one felony count for these violations, when each transaction would be a felony?

C. Did your office request records from Credit Suisse, Zurich, Bank Leu, Zurich, Union Bank of Switzerland, Zurich, Swiss Bank Corp., Basel, Barclays Bank International, New York, Bank of Boston SA, Luxembourg, Die Erse Oesterreichische, Vienna, Canadian Imperial Bank of Commerce, Ottawa, Canada or Standard Chartered Bank Limited, New York, all of which exchanged unreported money with Bank of Boston? If not, why not?

D. Why did you fail to pursue the investigation that might reveal where the large amount of cash in small demoninations from these Swiss banks originated?

(In other words, a competent investigation would have extended to Switzerland to attempt to prove that the money originated from drug-linked accounts. Another U.S. Attorney, Rudolph Giuliani of the Southern District of New York, has had tremendous success in getting Bank Leu to open its records in a case of insider-trading within the last month.)

E. Between 1979 and 1983 the Bank of Boston sold $7,372,343 in cashiers checks to various members of the Anguilo family including 163 checks for $2,163,457 in cash. Did you determine the origin of this money when you prosecuted Gennaro Angiulo? Why were these transactions not mentioned in the final criminal indictment of the Bank of Boston?

F. Why was the decision made to exempt officers and employees of the Bank of Boston from prosecution? Were not employees of the Provident Institution of Savings indicted for the same violations of the Bank Secrecy Law regarding the Angiulos, that the Bank of Boston employees were NOT indicted for?

G. Did this exemption from prosecution include officers at the North End Branch of the Bank of Boston which handled the Anguilo cash transactions?

H. Were those officers of the North End Branch of Bank of Boston questioned about the exempt status which the Anguilo family enjoyed at that branch? (The Anguilo accounts were on the "Exempt" list of accounts and therefore were not required to file CTR's)

I. Did you investigate who made the decision to exempt those accounts?

J. Did you investigate why the head teller, Howard K. Matheson, resigned from the bank in the middle of the investigation?

K. What answers did you receive about who in the Bank of Boston granted exemptions from cash reporting for the Angiulo-connected accounts?

L. Were Bank of Boston's Honorary Director William C. Mercer, or Senior Vice President Peter M. Whitman, who both contributed to your 1978 election campaign, involved in arranging the exemptions for the Angiulo business accounts? Were they in any way involved in making the decision to "overlook" the cash transactions reporting law in dealing with the Swiss banks?

M. Is it true that Bank of Boston chairman William Brown asked you or your office to drop any prosecution of the Angiulo-related violations in return for the Bank's plea of guilty to the violations involving the Swiss banks? (Sources in Boston believe that this "gentleman's agreement" between Weld and Brown, avoided the embarassment of linking Brown and others directly to Boston-centered crime and drug-selling).

II. USE OF CRIMINALS AS WITNESSES

FACT: A convicted cop-shooter and high level drug dealer, Jesse Waters, is currently being employed by Mr. Weld as the chief witness in witchhunt against the Boston Police Department which has significantly undermined the morale and effectiveness of law enforcement in Boston. Waters, convicted of shooting a police officer for attempting to arrest him in the act of selling a controlled substance, is presently in the Federal Witness Protection Program at the behest of Mr. Weld. Waters claimed that he had evidence that he was bribing Boston police, including Francis Tarantino, the officer he shot, AFTER, he was convicted of the shooting and of federal tax evasion related to drug profits -- over $1.4 million.

In another case, Mordecai Levy, the self-proclaimed leader of the Jewish Defense Organization (which is a splinter group of the Jewish Defense League, a terrorist group, according to the FBI report, attached), was called as a witness by Weld against the National Democratic Policy Committee and Lyndon H. LaRouche, Jr., a Democratic Presidential Candidate for 1988. Attached documents show Levy's role in two terrorist murders in 1985, the most serious terrorist incidents that occurred in the domestic United States that year.

A. Do you believe that it is justifiable to grant federal protection to a life-long drug dealer in order to use him for testimony?

B. Do you believe that "white collar crime" is a worse offense than selling marijuana?

C. Do you believe that marijuana should be decriminalized in the United States?

D. Do you believe that cocaine should be decriminalized in the United States? Same for heroin, other recreational drugs.

E. Is it true that Jesse Waters, a drug-dealer who has been arrested dozens of times in Boston, is now a protected witness, despite the fact that he shot a police officer, Francis Tarantino? Has Waters' 10-year jail sentence for the shooting of Officer Tarantino been reduced or erased because of his testimony?

F. Isn't it true that Officer Tarantino had to retire from the police force because of the critical injuries he suffered in that shooting?

G. Isn't it the case that Waters profited, according to federal court records, in the range of $1.49 million during only three years, from his drug dealing and other illegal activities?

H. When the FBI subpoenaed Mordecai Levy under your, and Mr. Daniel Small's orders, were you aware that Levy is under investigation for two deaths caused by terrorist bombs planted in 1985?

I. Were you aware that a Boston police officer was seriously injured while attempting to disarm a bomb that was planted by a Jewish extremist group? Were you aware that Mordecai Levy may be implicated in that bombing which injured a Boston police officer?

J. Was your office aware that the FBI is conducting an investigation, and there are other U.S. Attorneys in the who may be questioning Mordecai Levy, or that he may be a target of a federal investigation?

K. Did you or your office offer immunity to Mordecai Levy in return for his testimony, in the same manner that your office seems to have done for Jesse Waters, a drug dealer, who shot a police officer?

L. Do you plan in the future to offer such immunity to Levy?
M. Will the fact that you subpoenaed Mordecai Levy negatively effect the FBI and government's investigation into the murders of Alex Odeh of the American-Arab Anti-Discrimination League, and of New Jersey resident, Tscherim Soobzakov?

N. Does your interest in pursuing the investigaton of political figure Lyndon H. LaRouche, Jr., override your concern about the terrorist crimes in which Mordecai Levy may have been involved?

O. Were you aware that the House Judiciary Subcommittee conducted hearings this past July into the terrorist killing of Alex Odeh, where substantial testimony on Mordecai Levy was presented?

III. ABUSE OF OFFICE AND SELECTIVE PROSECUTION

FACT: William Weld has used his office to prosecute political enemies and run "trial by press" campaigns even when no convictions resulted. Theodore Anzalone, the chief fundraiser for former Boston Mayor Kevin White was ultimately acquitted of charges brought against him by Weld. Judge Juan Torruella wrote in the appellate court decision overturning the conviction of Anzalone, "We cannot engage in unprincipled interpretation of the law lest we foment lawlessness instead of compliance." The press play that surrounded the case was enough to convince Mayor White to cancel his planned re-election campaign.

Similarly, Vincent Piro, a member of the Massachusetts state legislature was the target of a three year FBI investigation into politial corruption in Sommerville and Chelsea, Mass. Piro was accused of federal extortion charges. The jury which acquitted him said that the government was "overzealous" and had, using undercover FBI agents, entrapped Piro into the scheme.

A. Who made the decision to prosecute Theodore Anzalone on currency transaction violations? For what reason?

B. Was the prosecution of Theodore Anzalone in any way related to the re-election campaign of the Mayor Kevin White?

C. Was Mayor White's re-election campaign ever discussed in the course of the Anzalone investigation or prosecution?

D. Who made the decision to prosecute Vincent Piro? For what reason?

E. Was Vincent Piro's position in the state legislature ever discussed in the course of the investigation or prosecution? Was it discussed in the course of determining the FBI's activity in investigating corruption in Sommerville and Chelsea?

F. Do you realize that you arranged a lesser fine for the Bank of Boston than for Mr. Anzalone, who you inappropriately prosecuted?

Were the prosecutions of Mr. Anzalone and Mr. Piro politically motivated?

IV: QUESTIONS ON PERSONAL FINANCES

FACT: There are a number of open questions on William Weld's, and his family's finances, which could seriously call into question his fitness for this very important job.

First, is the area of conflict of interest with Credit Suisse as it pertains to money laundering with the Angiulo organized crime family, and the Bank of Boston. David Weld, the father of William, since at least the 1940s, has had financial dealings with Credit Suisse, both directly, and through the Weld family's Swiss company, White Weld, A.G.

In 1978, the year that William Weld ran for Massachusetts Attorney General, a sequence of complicated transactions occurred which successfully buried the origins of White Weld, the Weld family company. Merrill Lynch appears to have purchased White Weld for $50 million. Subsequently, Credit Suisse purchased from Merrill Lynch White Weld's stockholders' "stake" for $25 million. Afterward, Credit Suisse bought into First Boston Inc. and First Boston bought into White Weld Securities of London.

A. What was the relationship of your father David Weld to Credit Suisse?

B. What is the current relation of the [David] Weld Trusts listed on your financial disclosure statement of 1984 to Credit Suisse or any of the banks named in the Bank of Boston indictment?

C. What interest do you or your spouse currently have with Credit Suisse or any of the banks named in the Bank of Boston indictment?

D. What interest do you or your spouse currently have through Scudder Cash Investment Trust to Credit Suisse or any of the banks named in the Bank of Boston indictment?

E. What financial changes occurred in 1978 to the company formerly known as White Weld? Was there any relation to those changes and your running for state Attorney General?

F. Did you ever discuss with family or with financial advisors the need to circumvent public financial disclosure prior to your running for state Attorney General, or taking the position of U.S. Attorney? Did these discussion have any bearing on the change in structure of White Weld at that time?

G. Bank of Boston and Baybanks of Massachusetts are engaged in joint ventures. Did your holding stock in Baybanks have any bearing on your plea bargain decision in the Bank of Boston case?

H. Did you have any discussions with your cousin, Christopher Weld in regard to the Bank of Boston plea bargain? (Christopher Weld is employed at Sullivan & Worchester, attorneys for the Bank of Boston) What bearing did these discussions have on the final plea?

I. Didn't the fact that Bank of Boston's Honorary Director William C. Mercer, or Senior Vice President Peter M. Whitman contributed to your 1978 election campaign for Massachusetts Attorney General, influence your decision to plea-bargain with the Bank of Boston?

J. Are there any additions to your 1984 financial disclosures at the present time?

K. Are you now, or have you been in the past, a consultant to, or investor in, a company called Tellabs, Inc., based in Lisle, Illinois, with a branch in Canada? (This is not listed in the 1984 financial disclosure statement).

L. Do you receive remuneration of any kind, including from investments, from Tellabs, Inc.? Can you describe this?

M. The Middle Ages, Inc., the company listed on your disclosure form of 1984 states that the partnership is "believed to have no value." Has that status changed since then? Do you receive income from that partnership?

Mr. SHORT. Mr. Weld, would you care to respond?

Mr. WELD. No, Mr. Chairman.

Mr. SHORT. The hearing stands in recess, subject to the call of the Chair.

[Whereupon, at 4:59 p.m., the committee was recessed, subject to the call of the Chair.]

BIOGRAPHIES

JOEL F. DUBINA

NOMINEE, U.S. DISTRICT JUDGE, MIDDLE DISTRICT OF ALABAMA

Birth: October 26, 1947, Elkhart, IN.

Legal residence: Alabama.

Marital status: Married. Margaret Elizabeth Gordy, three children.

Education: 1965-1970—University of Alabama, B.S. degree, 1970-1973—Cumberland School of Law, J.D. degree.

Bar: 1973—Alabama.

Military service: 1969-1974—Alabama Air National Guard.

Experience: 1973-1974—Law Clerk to Hon. Robert E. Varner, U.S. District Court, Middle District of Alabama. 1974-1983—Jones, Murray, Stewart & Yarbrough. 1983-present—U.S. Magistrate Middle District of Alabama.

ALAN C. KAY

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF HAWAII

Birth: July 5, 1932, Honolulu, HI.

Legal residence: Hawaii.

Marital status: Married. Patricia P. Kay, 3 children.

Education: 1951-1953, 1955-1957—Princeton University, A.B. degree. 1957-1960—University of California, Boalt Hall, LL.B. degree.

Bar: 1960—Hawaii.

Military service: 1953-1955—U.S. Marine Corps Corporal.

Experience: 1960-present—Case, Kay & Lynch (firm has had various names) Partner 1965-present.

RICHARD B. MCQUADE, JR.

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF OHIO

Birth: April 7, 1940, Toledo, OH.

Legal residence: Ohio.

Marital status: Married. Mary Jane McQuade, 4 children.

Education: 1959-1962—University of Toledo, B.A. degree. 1962-1965—University of Toledo, J.D. degree.

Bar: November, 1965—Ohio.

Experience: 1959-1965—Toledo Trust Co., Editor, of the house magazine, advertising manager, 1962, assistant treasurer, 1964. 1966-1968—Assistant county prosecutor, Fulton County, OH. 1968-1978—Prosecuting attorney, Fulton County, OH. 1975-1978—The McQuades Co., L.P.A. (general law practice with father and brother). 1978-present—Judge, Common Pleas Court, Fulton County, OH.

Office: Fulton County Courthouse, Wauseon, OH 43567, 419 335-8863.

Home: 5-2036-F, Swanton, OH 43558, 419 826-6086.

STEPHEN SPANGLER TROTT

NOMINEE, ASSOCIATE ATTORNEY GENERAL OF THE UNITED STATES

Born: December 12, 1939, Glen Ridge, NJ.

Legal residence: California.

Marital status: Married. Sally Snow Trott.

Education: Wesleyan University, Middletown, CT, B.A. June 1962. Harvard Law School, Cambridge, MA 1962-65, LLB in June 1965.

Bar: California, June 1966.

Military experience: None.

Experience: Office of District Attorney, Deputy District Attorney, Los Angeles County, 1965-1981. U.S. attorney, Central District of California, 1981-1983. Assistant Attorney General, Criminal Division, U.S. Department of Justice, 1983-present.

WILLIAM F. WELD

NOMINEE, ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Born: July 31, 1945.

Legal residence: Massachusetts.

Marital status: Married. Susan Roosevelt, 5 Children.

Education: 1956-1962—Middlesex School. 1966—Harvard College, B.A. sum cum laude. 1967—Oxford University, Economic. 1970—Harvard Law School, J.D.

Experience: November 1981-present—U.S. attorney for the District of Massachusetts. 1971-1981—Hill & Barlow, Boston, MA. 1978—Republican nominee for attorney general for Massachusetts. 1974—Associate minority counsel, impeachment inquiry, House Judiciary Committee. 1970-1971—Law clerk, supreme court, Massachusetts.

CONFIRMATION HEARINGS ON: DIARMUID F. O'SCANNLAIN, JAMES L. GRAHAM, JAMES KENNETH PORTER, AND FREDERIC N. SMALKIN

WEDNESDAY, SEPTEMBER 10, 1986

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 2:03 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Mathias and Simon.

Staff present: Duke Short, chief investigator; Jack Mitchell, investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The **Chairman**. The committee will come to order.

We meet this afternoon to hold hearings on one U.S. circuit judge and three district judges.

Our first nominee is Diarmuid F. O'Scannlain, of Oregon, to be U.S. circuit judge for the ninth circuit, vice Robert Boochever, retired.

We are very pleased to have you with us, and I see both of your distinguished Senators here, two of the most powerful Senators in the Senate, one, chairman of the Appropriations Committee, one, chairman of the Finance Committee. One raises money and the other one spends it.

So they are mighty good people to stand in with. [Laughter.]

I am glad they are both friends of mine.

We will be glad to hear from the senior Senator now from Oregon, and then the other Senator.

STATEMENT OF HON. MARK HATFIELD, A U.S. SENATOR FROM THE STATE OF OREGON

Senator **Hatfield**. Thank you, Mr. Chairman. Senator Mathias.

Mr. Chairman, both Senator Packwood, and I are honored today to have the opportunity to present to you, and to the committee, Mr. Diarmuid O'Scannlain. He is joined today by his wife, Maura, and three of his eight children, Shawn, Brendon, and Jane.

Mr. Chairman, as one who I know appreciates beauty in the human race, I would like to have all of his family stand. Thank you.

The CHAIRMAN. We are very pleased to have you with us.

Senator HATFIELD. Mr. Chairman, Mr. O'Scannlain has been a prominent attorney for over 20 years, and, as you have stated, he is now the nominee of the President of the United States for a position on the U.S. Court of Appeals for the Ninth Circuit.

In my opinion, Mr. O'Scannlain's keen intellect, diverse legal experience, and demonstrated commitment to public service provides justification for his appointment to the ninth circuit.

I might indicate that Mr. O'Scannlain was born in March of 1937 in New York, where he lived for 23 years. Having received a bachelor of arts degree from St. John's College in 1957, and after working a couple of years in the family business, he left to attend Harvard Law School.

In June 1963 he graduated from Harvard and went to work for Standard Oil of New Jersey, in the company's legal division as a tax attorney.

Deciding against pursuing a corporate career further, he left the east coast and moved west to Oregon in 1965. Since coming to Oregon he has had an impressive and varied career.

He has worked for a number of law firms in Portland. He served as deputy attorney general in the Oregon Department of Justice, and was appointed to be Oregon's public utility commissioner in 1971.

Nineteen months later, he was chosen as the director of the Oregon Department of Environmental Quality. Leaving the public sector in 1978, Mr. O'Scannlain joined the firm of Reagan, Roberts, O'Scannlain, Robertson & Neal, where he has continued to serve as a partner.

Mr. Chairman, Diarmuid O'Scannlain's legal practice has involved him in cases before the Oregon Supreme Court, the U.S. Court of Appeals for the Ninth Circuit, the U.S. District Court for the district of Oregon, and various lower Oregon State courts.

In addition to his many vocational accomplishments, Diarmuid O'Scannlain has been active in legal, political, and civic affairs. He was chairman of the Oregon Republican Party for several years, and currently serves on a number of civic boards and committees.

Mr. O'Scannlain is widely respected in the Northwest, both for his legal and interpersonal skills, and for his commitment to personal integrity, and public service.

I have known him personally for many years, and believe he would be a valuable addition to the ninth circuit. It is my hope that the committee will concur in the President's nomination of Diarmuid O'Scannlain, and favorably recommend his confirmation by the full Senate, and I would urge expeditious handling by the committee.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator. We are pleased to have you, and I know how busy you are, so you feel free to leave any time you want to.

Senator HATFIELD. I thank you.

The CHAIRMAN. Although you are welcome to stay, if you care to.

Senator HATFIELD. Thank you.

The CHAIRMAN. We will be glad to hear from you, Senator Packwood.

STATEMENT OF HON. ROBERT PACKWOOD, A U.S. SENATOR FROM THE STATE OF OREGON

Senator PACKWOOD. Mr. Chairman, Senator Mathias, for those of us who have known Mr. O'Scannlain for 20 years, we find it easier just to refer to him as "Di", rather than attempt to pronounce his very euphonius first name. [Laughter.]

I met Di in 1966, shortly after he had come to Oregon. He and I were active in what was then some Young Republican activities. We have since been precluded from that genre. However, we are both still active and have been active over the years, in political, social, and professional activities.

I am well aware of Di's qualifications as a lawyer, but I think when you look at the résumé and the comments that others have made of him, very little more needs to be said about his qualities as a lawyer.

They are exemplary. He is exemplary. I can speak personally, both socially and politically, about him. My wife, Georgie, and I have been a guest in his house. Di's wife, Maura, and Di, have been guests in our house.

He is the kind of a person who, if I were a criminal defendant, and he were the judge, and I was found guilty and he imposed a very harsh sentence, I would feel that I had probably still had a fair trial and a fair judge. I have seen him handle very difficult—not only political but social—circumstances, with grace, compromise, and tolerance that would stand us all well. And those are the kinds of qualities that I am delighted to see the President select for the Federal bench.

I hope this committee will very rapidly approve him and send him to the floor for confirmation.

The CHAIRMAN. You both feel he has professional competence——

Senator PACKWOOD. Without question.

The CHAIRMAN [continuing]. Integrity and judicial temperament?

Senator PACKWOOD. Without question.

Senator HATFIELD. Yes.

The CHAIRMAN. Thank you very much, and I know how busy you are, Senator Packwood. We are glad to have you. Stay as long as you want to, or feel free to leave, and we will come back to Mr. O'Scannlain in a few minutes for questions.

Senator PACKWOOD. Thank you.

The CHAIRMAN. Thank you for your presence, both Senators.

Senator Mathias, you have a nominee here and you have got another meeting, so we will take you next.

Frederic N. Smalkin. Is that pronounced Smalkin?

Mr. SMALKIN. Smalkin.

The CHAIRMAN. Frederic N. Smalkin, of Maryland, to be U.S. district judge for the district of Maryland, vice James R. Miller, Jr. We are glad to have you with us, Mr. Smalkin.

Mr. SMALKIN. Thank you, Mr. Chairman.

The CHAIRMAN. We will now hear from the distinguished senior Senator from Maryland who is a member of this committee.

STATEMENT OF HON. CHARLES McC. MATHIAS, JR., A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator MATHIAS. Thank you, Mr. Chairman, and I appreciate your indulgence in arranging the agenda, so that we can go to another important meeting which is about to take place.

It is a real pleasure, and I consider it an honor, to introduce to the committee the highly qualified nominee of the President of the United States for the position of U.S. district judge for the district of Maryland, Frederic N. Smalkin.

Fred Smalkin has probably accomplished more in 40 years than most lawyers will achieve in a lifetime twice that long. He has had a remarkable legal career. It has been marked at every turn by consistent success, and by an uncanny ability to be the best.

He is a native of Maryland and he graduated from the Johns Hopkins University in 1968. I might note that he was Phi Beta Kappa at Johns Hopkins, which is not an easy achievement.

He joined the U.S. Army. I know the chairman will resonate to the fact that he is a veteran of the Army. He joined in June 1968, and while he was on a leave without pay status, he attended law school at the University of Maryland and graduated in 1971. He was first in his class.

He was then a clerk for Judge Edward S. Northrop who was formerly the chief judge of the U.S. district court, and I might say, that I have had no more enthusiastic response or encouragement from anybody in pressing the nomination of Fred Smalkin than Judge Northrop who knows him well.

In 1972, he went on full-time active duty in the Army. He worked in the Administrative Law Division of the Judge Advocate General's Office.

He then served as assistant to the general counsel of the Army and he was discharged in 1976 with the rank of captain. Within 5 months he was appointed magistrate for the district of Maryland and he serves in that capacity today as well as a lecturer at the University of Maryland Law School.

So clearly, his credentials and experience are unusual and exceptional. He has an intimate familiarity with the workings of the court. He handles referrals from the judges of the district court. He has tried a great many civil jury and nonjury trials, so he has had practical judicial experience.

But I think the important thing we bring to the committee is the evidence of the enormous respect that he commands. Judges, colleagues at the bar, practicing attorneys, all line up to praise his intellectual ability, his fair mindedness and his integrity.

I think he has a reputation for being able to master a complex situation. His rulings are models of clarity and precise reasoning, and we in Maryland are proud of Fred Smalkin. I am confident that his service on the court will continue in the long tradition of outstanding and distinguished jurists on Maryland's Federal bench. I would urge the committee to confirm him as quickly as possible so that we may have a full bench in Maryland, and we may have the benefit of his services.

And I would like to add, Mr Chairman, that he is supported by a very fine family who are all here. Mrs. Smalkin is here, and Ned, who seems to be occupied with a cookie, and Kathy, who the Chair may not be able to see because she is not quite tall enough to get beyond the table. Thank you very much, Mr. Chairman.

The **Chairman**. Well, they are beautiful children. They favor the mother.

We will be very pleased now to hear from you, Senator Sarbanes.

STATEMENT OF HON. PAUL S. SARBANES, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator **Sarbanes**. Thank you very much, Mr. Chairman, and members of the committee.

I am very pleased to appear before you today with my distinguished colleague, Senator Mathias, to recommend strongly, to the committee, the confirmation of Fred Smalkin to serve on the U.S. District Court for the district of Maryland.

He will bring to the Federal bench an outstanding record of professional practice and public service.

Senator Mathias has detailed that for the committee, and I will not repeat, but only make the observation that Fred Smalkin had an absolutely superb academic record: Phi Beta Kappa at Johns Hopkins, first in his class at the University of Maryland Law School. He clerked for our Chief Federal District Judge in Maryland, the same court to which he has now been nominated, and served with great ability in the Judge Advocate General's Office, and in the Office of the General Counsel of the Department of the Army.

For the last 10 years, for the last decade, Fred Smalkin has served with great distinction as U.S. magistrate in the U.S. District Court of Maryland.

I would like to note that all of those who have worked with him in this important position have high praise for his legal ability, his fairness, and his integrity. He has carried out his responsibilities with skill and dedication, and his service as magistrate has earned the respect of the practicing bar. In fact last year, by invitation of the fourth circuit, he spoke at the annual judicial conference on the role of the magistrate.

In addition he has been active in his community as a vestryman of his church, and his community association; as a teacher at the University of Maryland School of Law, and in the Continuing Professional Education Program of the Maryland Bar and the Federal Judicial Center.

He brings to the committee a distinguished academic record, a devotion to the law, significant accomplishments in public office as U.S. magistrate, and a fair and objective attitude which we seek in the members of the Federal bench.

I am pleased to join Senator Mathias in recommending him to the committee.

The **Chairman**. Senator, we are glad to have you here. We thank both of you for appearing in person on behalf of this nominee.

Senator Mathias, I presume you recommended him to the President.

Senator **Mathias**. Highly recommended.

The **Chairman**. I also congratulate him on having your friendship and recommendation, and also congratulate him on the President's recommending him, and congratulate Senator Sarbanes for coming here on your behalf. You are fortunate to have both Senators make strong statements on your behalf, and that will go a long ways. Of course Senator Mathias is on the committee, and I am sure that he, along with I and the rest, will press to get you out, and if our distinguished Democratic friend here does not object, we will get you right out.

We will now excuse you, gentlemen. Thank you.

Senator **Mathias**. Mr. Chairman, Mr. Jacob Stein, a very distinguished member of the bar is present but will not testify, he has prepared a statement, and I would ask unanimous consent that Mr. Stein's statement be included.

The **Chairman**. Without objection, that will be done.

[The statement follows:].

Prepared Statement of Jacob A. Stein in Support of the Nomination of Frederic Smalkin

I have practiced law continuously in the Federal courts in the District of Columbia and Maryland for 38 years. I have appeared before Magistrate Smalkin in the United States District Court for the District of Maryland. The cases were complex. They involved many attorneys. It became clear to me and all the other attorneys in these cases that Magistrate Smalkin was an outstanding lawyer and judge. Mr. Smalkin quickly grasped the issues in the cases and his knowledge of the facts was phenomenal. One of the cases which would have taken several weeks to try he, through skillful mediation, settled and with the thanks of all the participants. I really do not believe I have met another judge who could have settled that particular case.

Over the years I have been called and interviewed by the FBI concerning some 40 or 50 judicial appointments. None was better qualified to serve as a United States District Judge than Mr. Smalkin.

Senator **Mathias**. And that the record note that he was here, in person.

The **Chairman**. Thank you. I thank you very much.

Oh, did you have any questions?

Senator **Simon**. No. I did not.

The **Chairman**. I did not think you had any.

Our next nominee is James L. Graham, of Ohio, to be U.S. district judge for the southern district of Ohio.

Is Senator Glenn here?

Senator **Glenn**. Yes.

The **Chairman**. Senator Metzenbaum? If you gentlemen will come around.

Senator Glenn, we will be glad to hear from you.

STATEMENT OF HON. JOHN GLENN, A U.S. SENATOR FROM THE STATE OF OHIO

Senator **Glenn**. Thank you, Mr. Chairman. I appreciate that, and I am pleased, indeed, today, to introduce to the members of the Judiciary Committee, James L. Graham.

Mr. Graham is a highly respected member of the Ohio Bar since 1962. He received both his undergraduate and law degrees from Ohio State University, and during his 24 years as a trial lawyer, Mr. Graham was trial counsel in such major cases as the Mobil-Marathon takeover litigation, and the Federal Glass antitrust case.

He has also served as trial counsel for such major corporations as Dow Chemical and Anheuser-Busch.

Mr. Graham is a member of the American College of Trial Lawyers, an association of trial specialists limited to 1 percent of the practicing lawyers in any State, and whose membership is by invitation only.

He is also a member of the Columbus, the Ohio State, and American Bar Associations as well as the Florida Bar Association, the Barristers Club, the American Judicature Society, the Ohio Academy of Trial Lawyers, the Lawyer-Pilots Bar Association, and numerous other professional organizations.

Despite his very busy professional schedule, Mr. Graham has found time to author numerous articles on tort law and civil procedure, and to lecture at the Ohio Legal Center Institute at Capitol University in Columbus, OH. He was also a member of the Ohio Board of Bar Examiners from 1969 to 1974.

Mr. Graham additionally is active in community service. He served as a member of the development commission of the city of Columbus from 1972 to 1976, and also, on the advisory board of the Salvation Army.

Mr. Chairman, as you can see, from all the above, Mr. Graham is a well-versed, a well-rounded individual whose legal, and other skills, are above reproach.

And Mr. Chairman, when these appointments are made, we obviously canvas many people back home to see what their opinions are, and I have received nothing but praise for Mr. Graham from my constituents in the southern district of Ohio.

And I believe that he possesses the temperament, the integrity, and the drive to be one of the best Federal judges appointed by this administration, and I trust that the members of the committee will approve his nomination, and I am honored to be able to recommend him to you, without reservation. Thank you.

The CHAIRMAN. Thank you very much, Senator Glenn. We are very pleased to have you with us, and to give such a high recommendation here to Mr. Graham.

Senator GLENN. Thank you.

The CHAIRMAN. Now is Senator Metzenbaum coming, do you know?

Senator GLENN. I know he was planning to be here, Mr. Chairman. I have not seen him in the room. He may be along a little later.

The CHAIRMAN. He is a member of this committee and will be voting for him, I am sure. Thank you very much, Senator, for coming.

Let's see now. Our next is James Kennth Porter. Congressman Quillen is here to recommend him. If you both will come around.

Congressman Quillen, we are glad to have you and will be pleased to hear from you.

STATEMENT OF HON. JAMES H. QUILLEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Mr. QUILLEN. Thank you, Mr. Chairman, and Members of the committee.

First, I want to congratulate all of you for the fine job that you are doing, and for your dedication in your work.

It is my pleasure to present to you Judge James Kenneth Porter, a man whom I recommended to President Reagan for nomination as U.S. district judge for the eastern district of Tennessee.

I have known him, and his family, for more than 35 years. We served in the State legislature together prior to my election to the Congress 24 years ago.

His lovely wife, Janet, is with him today, and I will ask her to stand at this time. Janet.

The CHAIRMAN. Glad to have you with us.

Mr. QUILLEN. Judge Porter has served the Fourth Judicial District of Tennessee as circuit judge since 1974. In that position he has tried hundreds of cases and has compiled an enviable record, a record for fairness, integrity, principles, qualification, maturity, honesty and knowledge of the law.

A visit to his court will reaffirm anyone's belief, that in these United States of America, justice is for all, not just for those who can afford it. He sets high standards for himself, and those whose business touches his court. The man I introduce to you makes every effort possible to give the defendant a fair trial and makes certain that he understands his rights. A man of compassion, he thoroughly considers every sentence he must pass, but he does not let sympathy stand in the way of his decisions.

His decisions are always based on the facts and arguments presented in his court, and as prescribed by the law. When Judge Porter charges a jury, every juror has a clear idea of what he is supposed to do and the rules governing his decision and how he does it.

Any section of his charge studded with legalese gets broken down into plain English. His friendly attitude toward those serving as jurors makes it easy for them to ask about anything they do not understand.

He works at his job. When he walks into the courtroom, he knows the case he is going to try. He is stern and tough when he needs to be. He demands that lawyers come prepared into his court, with the results that they serve their clients better.

He sets high standards which result in a fairer trial. Because of his regular attendance at seminars and workshops, he knows the latest rulings in the ever-shifting world of legal opinion. One newspaper aptly described Judge Porter's work on the bench when it stated: "When a lawyer recites the law, he knows the law; when he cites a recent ruling, Judge Porter knows the case."

Judge Porter practiced law for 17 years before being elected to the bench. In that period he gained a reputation as one of Tennessee's finest young attorneys. He has prepared himself well.

His record of academic excellence dates back to his days at the University of Tennessee College of Law, where he was editor in chief of that school's law review, and was named to the Order of Proof upon graduation.

He has repeatedly been selected, appointed and elected, to positions of leadership by his peers and the good citizens in the great State of Tennessee.

In addition to being elected judge, he has been elected to serve in both the House and the Senate of Tennessee. His résumé will convince the most skeptic, that Judge Porter is certainly an outstanding citizen, family man, lawyer, leader, respecter of the law, and judge.

He has also served on the faculty of the judicial college and has served for the past 3 years as president of the Tennessee Trial Judges Association.

Judge Porter has been elected time and again by his fellow citizens and been granted leadership positions, time and again, by every group with which he has been associated. And over a lifetime has been consistently accorded powers, honors, and responsibilities by those who have known him best. I might add, he has long been in the forefront of the fight against drugs. I will cite an instance where an airplane loaded with cocaine was caught in his district.

The judge promptly ordered the defendant held under a $50 million bail.

The position of U.S. district judge for the eastern district of Tennessee is a demanding position, but Judge Porter has all the attributes it takes to do that job.

Each paper in east Tennessee recognizes his talents, and has endorsed him for this judgeship. By this nomination, it would seem to me that President Reagan recognizes and appreciates Judge Porter's attributes and talents.

I submit him to you and recommend his confirmation. Judge James Kenneth Porter of Newport will do an outstanding job. Thank you, Mr. Chairman, and members of the committee.

The **Chairman**. Congressman Quillen, we are glad to have you with us. I thank you for coming in person and speaking on behalf of Judge Porter.

And Judge Porter, I congratulate you upon your appointment by the President, and I congratulate you upon having such an esteemed and admired Congressman here to recommend you for this position, and we hope you will enjoy being on the bench. And we will now excuse Congressman Quillen. Oh, Senator Simon, you had something?

Senator **Simon**. I simply wanted to add that I had the privilege of serving in the House with Congressman Quillen and he is a very fine House Member, and we are pleased to have you over here with the nominee.

Mr. **Quillen**. Well, thank you, Senator. We miss you in the House.

Senator **Simon**. Some people say both bodies were improved when I came to that House. [Laughter.]

Mr. **Quillen**. Thank you. Thank you, Senator.

The **Chairman**. Thank you very much, Congressman Quillen.

We will now ask Mr. O'Scannlain of Oregon to come around. We will ask all four of the nominees to stand up and be sworn at one time.

Raise your right hands. Will the testimony you give in this hearing be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **O'Scannlain**. Yes.

Mr. **Graham**. Yes.

Judge **Porter**. Yes.

Mr. **Smalkin**. Yes.

TESTIMONY OF DIARMUID F. O'SCANNLAIN, OF OREGON, TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT, VICE ROBERT BOOCHEVER, RETIRED

The **Chairman**. We will take Mr. O'Scannlain first.

Mr. O'Scannlain, I believe you have been a practicing attorney for over 20 years. Is that right?

Mr. **O'Scannlain**. Yes.

The **Chairman**. Now, the President has nominated you to be a U.S. circuit judge for the ninth circuit. Do you foresee any difficulty in the transition from private practice to that of an appellate judge at the Federal circuit level?

Mr. **O'Scannlain**. Mr. Chairman, I do not. I might say, that I have appeared before the ninth circuit court of appeals as part of my professional practice.

I have also appeared in appellate courts in the State system. So, I feel from that standpoint, it is a familiar area, and I would also like to add that both Chief Judge Browning and Director Leo Levin of the Federal Judicial Center, have been most gracious in telling me about specific transition programs that they have to welcome the newly appointed judge, and to assist in that transition.

The **Chairman**. Mr. O'Scannlain, would you give us your own perspective on the recent trend in the Supreme Court toward stricter requirements of standing.

Mr. **O'Scannlain**. Well, Mr. Chairman, I think that the importance of standing, and, for that matter, ripeness, as doctrines that need to be carefully applied in interpreting the Constitution, is most significant indeed. When I was at Harvard Law School, the school of thought that was most impressed upon me, and the one that I found myself most persuaded to, was the school of judicial restraint, the Frankfurter school. And I recall many hours in study in our constitutional law class, and, for that matter, some of the other areas as well, even administrative law, when the relevance of standing was emphasized. I find myself in agreement with the proposition that the courts have a certain function, but so do the legislative bodies, whether it is the Congress or the State legislature.

There is a very important separation of powers that must be established, and it is really up to the legislative body to make clear just how broad the reach of a particular piece of legislation is.

And for that reason, and for reasons of judicial economy, I welcome the developments in the application of the rules of standing over these recent years.

The **Chairman**. Mr. O'Scannlain, to what extent do you see the American system of federalism, or division of responsibilities between the National and State governments, as an institution protecting the abuse of governmental powers?

Mr. **O'Scannlain**. Well, Mr. Chairman, it occurs to me that perhaps part of my background may be of particular value to the ninth circuit court of appeals because I have served, in the past, as the director of two State agencies in the administration of Gov. Tom McCall.

And during the time when I was director of these agencies, I found that so frequently we were rubbing shoulders with Federal agencies, whether it be the EPA or the FCC or the Federal Energy Regulatory Commission, and so often there were statutory patterns in the Federal code which, in many cases, followed, or were followed by patterns in the State law.

So what became very obvious to me as a result of that experience was that the States have an important role to play in our Federal system, and that role is a protected role under the Constitution.

So, of course, do the Federal agencies and the Federal executive branch, and I think the important principle that should come out of all of this would be that both the States and the Federal Government have important roles, and their roles must be recognized as the Constitution continues to be interpreted.

The CHAIRMAN. I notice you graduated from Harvard in 1963.

Mr. O'SCANNLAIN. That is correct, Mr. Chairman.

The CHAIRMAN. But you have not turned left yet, have you? [Laughter.]

I notice further, that you went 2 more years to New York University.

Mr. O'SCANNLAIN. That is correct.

The CHAIRMAN. I was always under the impression that after you finished at Harvard that is about as far as you could go. [Laughter.]

I do not have another question and I will now turn to my able and distinguished friend from Illinois, Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

Mr. O'Scannlain, as I review your background, it is clear to me that you have a good understanding of tax law, corporate law, and utility law.

Criminal law is not an area of strength in your background. I notice that you have no experience working with a jury.

Do you have any plans to strengthen yourself in that regard? We have had, for example, others who have been nominees who have said they intend to go somewhere outside of their jurisdiction just to sit in on some trials for awhile, just to get a better feel for whatever their area of deficiency might be.

Mr. O'SCANNLAIN. Well, Senator, the answer to your question of course is yes, indeed. I would point out, that in the early days of my practice, I did accept appointments under the old Federal indigent appointment program for a number of criminal defendants in various aspects of their process, in some cases having to do with sentencing; in other cases having to do with preliminary appearances.

It is true that I have not tried a criminal case to a jury, but on the other hand, I would expect to do several things.

First of all, I have already made contact with Leo Levin, Professor Levin, who is the director of the Federal Judicial Center, who was most gracious, and pointed out the series of specific seminars that are made available to newly appointed judges, particularly to fill in areas which need some strengthening in terms of the individual backgrounds of the various appointees.

And then, second, I am very much persuaded to the idea that I should sit on the district bench as an additional judge in several cases, perhaps not necessarily in the jurisdiction in which I live, but that is certainly an option. But it is certainly one of those things that I have already thought about and I would be happy to do.

Senator SIMON. I would just pass along the recommendation that you move in that direction. I think seminars are fine, but the real world is always a little different than seminars.

Mr. O'SCANNLAIN. I agree.

Senator SIMON. I have no further questions, Mr. Chairman.

The CHAIRMAN. I thank the Senator.

Again I want to congratulate you on your appointment and hope you enjoy serving on the bench.

Mr. O'SCANNLAIN. Thank you very much, Mr. Chairman.

The CHAIRMAN. You are now excused.

Our next is James L. Graham of Ohio. Mr. Graham, if you will come around.

TESTIMONY OF JAMES L. GRAHAM, OF OHIO, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF OHIO, VICE ROBERT M. DUNCAN, RESIGNED

The CHAIRMAN. Do you have any family with you, Mr. Graham?

Mr. GRAHAM. Yes, I do, Mr. Chairman.

The CHAIRMAN. Would you care to introduce them.

Mr. GRAHAM. I would like to introduce my wife, Phyllis Graham, my daughter, Laura Graham, and my good friend, Dr. Thomas Hartranft from Columbus.

The CHAIRMAN. We are very pleased to have you with us.

Mr. Graham, you have been a practicing attorney, I believe, since 1962. During that time your litigation experience has been exclusively civil in nature.

Would you tell the committee what steps, if any, you have taken to prepare yourself for the criminal caseload that awaits you at the Federal district court, or what steps you plan to take?

Mr. GRAHAM. Yes. Mr. Chairman, while the bulk of my trial experience has been in civil cases, I have had some criminal experience including trying a first-degree murder case some years ago.

However, I do recognize the need to fortify and increase my knowledge in that area. I have already been in contact with the Federal Judicial Center, and am prepared to attend a new judges seminar that they have scheduled, a few weeks hence, if I should be confirmed. I have also been in contact with the two district judges that I will be serving with, if I am confirmed.

I am happy to say, Mr. Chairman, that I have an excellent relationship with those two judges, and both of them have assured me every assistance possible in any area, and they both recognize I will need some in that area.

The CHAIRMAN. Now, Mr. Graham, will you tell the committee what procedures you will follow in determining any potential conflicts of interest, and how you intend to resolve them.

Mr. GRAHAM. Yes. Mr. Chairman, I suppose first and foremost, I am completely severing my ties with my present law firm. There will be some financial arrangements involved there which will be concluded within a period of 3 years.

The other area that I would have some concern with in the area of potential conflicts of interest would be in terms of presiding over trials in which former clients might be involved, and I will indeed be sensitive to that and will refrain from sitting in any such cases for an appropriate period of time.

The CHAIRMAN. Mr. Graham, one of the criticisms of judicial system is a tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals.

Do you feel that this criticism is valid, and would you please explain your answer.

Mr. GRAHAM. Yes. I believe in some instances that criticism is valid, Mr. Chairman, and I think that in some instances that has been an unhealthy trend in the Federal judiciary.

I firmly believe in the concept of the separation of powers, and would feel that I would be inclined to exercise restraint in those kinds of cases.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. Yes. Mr. Graham, as I look through your background, I note that the bar association gave you a mixed qualified/not qualified rating.

Why would some vote "not qualified?" Do you have any feel for that?

Mr. GRAHAM. Senator Simon, I am disappointed, that apparently one member of the committee did vote that way. I am pleased that the vast majority of the committee did find me qualified to serve.

I was surprised that one individual was in disagreement with that. I have no idea why.

Senator SIMON. Canon II of ABA Code of Professional Ethics says, "Every lawyer, regardless of professional prominence, or professional workload, should find some time to participate in serving the disadvantaged."

What have you done to live up to that particular canon in the code of ethics?

Mr. GRAHAM. I think that is an important canon. Senator Simon, I, for a period of about 5 years, have volunteered my services as trial counsel to indigent defendants charged with Federal crimes.

In more recent years, I have provided legal service to disadavantaged persons through my church affiliation.

Senator SIMON. I notice that you are a member of the Defense Research Institute National Arbitration Panel, which "adjudicates disputes between members of the insurance industry."

How did it get the name Defense Research Institute, if it——

Mr. GRAHAM. Well, I believe it received that name, initially, because it was engaged in activities which would develop legal research on behalf of those interests involved in defending litigation.

Senator SIMON. I have no further questions, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator.

I congratulate you on your appointment and hope you enjoy serving on the bench.

Mr. GRAHAM. Thank you, Mr. Chairman.

The CHAIRMAN. You are now excused.

Judge Kenneth Porter, will you come around.

TESTIMONY OF HON. JAMES KENNETH PORTER, OF TENNESSEE, TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TENNESSEE, VICE ROBERT L. TAYLOR, RETIRED

The CHAIRMAN. Judge Porter, you presently serve as a judge on the Fourth Judicial District, State of Tennessee.

I believe this is a court of general jurisdiction?

Judge PORTER. It is, Senator.

The CHAIRMAN. You have unlimited civil and criminal jurisdiction?

Judge PORTER. Yes, sir.

The CHAIRMAN. You have the power of death in cases of crime?

Judge PORTER. It is imposed by the jury in Tennessee, sir, but the judge can look at it after the jury imposes it. The judge does not impose it in Tennessee, as they do in Florida.

The CHAIRMAN. The jury imposes the death sentence?

Judge PORTER. The jury imposes the death sentence in Tennessee, yes.

The CHAIRMAN. In our State, the circuit judge only imposes death if the jury does not recommend mercy in those cases. Is that the way it is in Tennessee?

Judge PORTER. No; the jury passes on first and second-degree murder cases, Mr. Chairman. The jury must determine the degree, first or second. If it is first, then they must consider whether there are aggravating circumstances in line with the Supreme Court decision that says it must not be—you know—assessed indiscriminately. Then the jury makes their judgment. Then the defense attorney can ask the court to review it. All the court could do is order life.

The CHAIRMAN. But the jury makes the decision?

Judge PORTER. The jury makes——

The CHAIRMAN. The judge can review it?

Judge PORTER. Yes, sir.

The CHAIRMAN. I see. I was a circuit judge in South Carolina, a similar position, except there, the judge imposes sentence, but he only imposes sentence after the jury acts and recommends the death penalty.

Judge PORTER. Yes, sir.

The CHAIRMAN. I believe you served as a member in the House of Representatives of the Tennessee General Assembly for 4 years, is that correct?

Judge PORTER. I did, and I had the distinct honor, Mr. Chairman, of nominating James H. Quillen, who introduced me here today, as speaker of the house of representatives in 1961, Senator Biden. I mean, Senator Simon; pardon me, sir. You served with him. I served with him, too.

Senator SIMON. You can apologize to Senator Biden, not to—[Laughter.]

Judge PORTER. All right, sir.

The CHAIRMAN. Senator Simon is from Illinois.

Judge PORTER. Yes, sir. Yes, I am going to try to do better, Mr. Chairman.

The CHAIRMAN. He is a very fine Senator. So, let's see now, you served in the House 4 years. With this background, do you believe that changes in the law should be reserved to the legislature whose members can be altered by the voters, if elected officials fail to reflect the values of society?

Judge PORTER. Yes, Mr. Chairman, I do. I think our Constitution conceives of a tripartite government. We have the legislative branch and that is where the public is to address their grievances, and I served in the House, in the Senate, and I certainly think so. Yes, Mr. Chairman.

The CHAIRMAN. Judge Porter, I consider judicial temperament to be an important prerequisite for a Federal judge. I have seen some Federal judges rather arbitrarily yell out or embarrass lawyers or witnesses, or jurors, and when it was not necessary to do that.

Now I understand you run a court that is very dignified and very professional. I commend you.

Judge PORTER. Thank you, sir.

The CHAIRMAN. I am sure you would never be caught doing anything like that.

Judge PORTER. I would hope not, sir.

The CHAIRMAN. Judge Porter, how would you resolve a conflict between your own conscience, or your own sense of justice, and the clear meaning of a statutory or constitutional provision?

Judge PORTER. Mr. Chairman, when you take the oath to become a circuit judge—as you know, sir, from South Carolina—that you take the oath to support the Constitution and the laws of the land. I do not think it proper for a judge to begin to substitute his conscience, that ephemeral conscience that may vary from person to person, from what has been adjudicated in the courts, what the legislature has decided, and what the founding document said.

So I would say to you, sir, that I would honor the law, would honor the Constitution.

The CHAIRMAN. Thank you very much. The distinguished Senator from Illinois.

Senator SIMON. Yes. Judge Porter, I have in front of me the Knoxville Journal of May 5. I am sure you have seen it.

Judge PORTER. Interesting title, isn't it, sir?

Senator SIMON. "Porter in the Court: Firm Jurist or Tyrant,"——

Judge PORTER. Yes, sir.

Senator SIMON [continuing]. And then a question mark. I assume you would not describe yourself as a tyrant?

Judge PORTER. No, sir. I would not.

Senator SIMON. We have received some communication, not questioning your ability, but questioning whether you have the temperament to be a Federal judge. How would you respond to that?

Judge PORTER. I would respond to it in the same fashion that the chairman addressed the question. I think that judicial temperament is very important. I think it is very crucial. A judge—the most—one of the most important things he does—he must set the tone, sir, of a courtroom, to let the public know, to let the litigants know, to let the lawyers know that we are here for a very important purpose.

We have an issue to address that has divided people, or, a crime to be prosecuted, that we must focus that attention, that we must let the jury—most—all criminal cases are jury cases, felony cases. About half the civil cases are tried to juries.

You must make that jury comfortable so that jury can work its will, and marvelous it is that they do. It is—I know why but I will not get into it. It will extend the record, unnecessarily.

But let me say this: I run a tight court, sir. I like tight courts. I have practiced before able judges who ran strict courts. I knew where I was. I knew what the issues were. I knew that I had to be there on time; I had to be prepared, and I was prepared, and we tried the lawsuit on the merits. I have appeared, sir, in front of some judges who were able, but who did not focus the attention that I think the best judges do. The witnesses would wander in the testimony. Lawyers would take up time. You would get lost in the process, and, consequently, without that focus of attention, Senator Simon, you sometimes do not get that just result you seek.

Now a lawyer who is prepared, who is prepared on the law, who has talked to his witnesses, who knows what the issues are, who comes to court to seek justice in that forum for truth—he has no fear of me. But the lawyer who is dilatory, who is unprepared, who wants to put it off—justice delayed is justice denied, sir. I feel it is one of my responsibilities to see that issues are laid at rest, promptly, after being fully and fairly considered.

And I look askance on delay. So, for those lawyers who want to put it off, who want to slip, slide, and duck, who do not want to address the issues, they have trouble in my court, sir.

Senator SIMON. I applaud efforts to avoid dilatory tactics. The article quotes some lawyers—unnamed—as referring to you as a "tyrant in the courtroom," and I am quoting from the article now.

Judge PORTER. Yes, sir.

Senator SIMON. "Most of them said they did not question his legal abilities, but they were concerned about his courtroom temperament and demeanor. One lawyer privately admitted he had given the FBI a good recommendation on Porter because he does not do much Federal practice and wants the judge out of the State court." A recommendation but not exactly for the reasons you might want.

Judge PORTER. Yes, sir.

Senator SIMON. Well, judges in any court can be a little rougher on the edges than they should be. It is one thing to be tough, but you can be both tough and gracious.

Do you think maybe this is an area where you need to look at yourself and improve things a little bit?

Judge PORTER. Senator Simon, I think every judge must constantly look at himself, and I do. I think the criticism is totally unfounded.

I would point out, sir, that these anonymous people quoted in the newspaper were anonymous. It came not from the circuit where I try lawsuits, either my former six-county circuit or any present four-county district.

This came from the Knoxville Bar Association. They have tried maybe—there are 700 lawyers there. Perhaps 10 or 15 have tried lawsuits in my court. There was a whisper campaign going on, and it was effective. I want you to look at the headline. Wasn't that beautiful? I do not think they were altogether for me there. But now I have been in the arena a long time. I have been booted around, kicked around, run over, and this I—this was some criticism from a whisper campaign.

But I would say this: I think the measure of a man, Senator Simon, is the authority he can handle without becoming drunk on his own power and infatuated with his own importance, and I know you have observed, and we all in this room have observed, how some person gets a little bit of power and it just drives him up the wall. Others handle it with grace and ease, and I would try, sir, for so long as I am privileged to serve the people, to handle it with grace, ease, firmness, fairness, and impartiality, sir.

Senator SIMON. I think that is important.

Judge PORTER. I do too, sir.

Senator SIMON. I have no further questions, Mr. Chairman.

The CHAIRMAN. Thank you, Senator. Those are all the questions I have. I congratulate you on your appointment, and I hope you enjoy serving on the bench.

Judge PORTER. May I say, Mr. Chairman, to this committee, what a delight and privilege it is for a little lawyer from Newport, TN, to come and stand before you all. Thank you so much.

The CHAIRMAN. Thank you. Mr. Smalkin.

TESTIMONY OF FREDERIC N. SMALKIN, OF MARYLAND, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF MARYLAND, VICE JAMES R. MILLER, JR.

The CHAIRMAN. Mr. Smalkin, in reviewing your file, I note that you have served as U.S. magistrate for the District of Maryland since 1976. Is that correct?

Mr. SMALKIN. Yes, sir.

The CHAIRMAN. I am sure you have noticed an increase in the caseload before the Federal district court over the years.

Mr. Smalkin, what, in your view, is needed to speed up the disposition of Federal cases? Would it be more judges, magistrates, or changing the criminal procedures, or just what?

Mr. SMALKIN. Well, Mr. Chairman, I believe that the criminal procedures that we have now, especially the Speedy Trial Act, have gone a long way toward insuring speedy disposition of all criminal cases, and I do not know that more legislation is warranted.

With regard to other matters in the Federal courts, the tremendous increase in our statutory jurisdiction has led to a situation where we have in many districts, including ours, a pending civil caseload of 300 to 400 per district judge, which is a tremendous number to deal with in an individual calendar system. I think the key to effective disposition of cases is intensive management, intensive management by the district judge, making sure there is always something to be done in every case, something calendared that the lawyers and the judge can focus on so the case does not get lost between the chairs.

With regard to other matters along this general line, I am cochairman of the Civil Alternate Dispute Resolution Committee of the Maryland State Bar Association. I have settled literally hundreds of civil cases in the Federal courts, and I believe that the magistrates should be utilized as, and I hope in our district, they will continue to be utilized as, settlement mediators, to help relieve the backlog of cases that otherwise would not have as strong an impetus to settle.

The CHAIRMAN. Mr. Smalkin, it seems that many drug dealers, when arrested, are able to pay bond money easily, and in some cases leave the country to resume their illegal activities elsewhere.

On July 22, 1981, I believe you testified before the Select Committee On Narcotics Abuse and Control, U.S. House of Representatives, to the effect:

> Narcotics offenders, because of the huge amounts of money that are available to many of them, often view bail simply as a cost of continuing to do business, or of fleeing prosecution.

Would you tell the committee what you would do to deter the illegal drug trade, and how you would prevent narcotics dealers from viewing bail simply as a cost of doing business.

Mr. SMALKIN. Mr. Chairman, I did so testify, it was my privilege to do so in 1981, and I certainly cannot claim much of the credit for it, but as you know, the legislation, the Federal jail legislation, has since been amended, and the new legislation has gone a long way toward ending the prior situation where high money bails were just a cost of doing business.

Now the presumptions built into the current legislation have led to the detention of the most dangerous drug dealers, and those who are most apt to flee.

With regard to sentencing, of course, the Congress has provided for very stiff sentences in continuing criminal enterprise cases. We also have the civil forfeiture procedures under RICO and the sanctions that are available under RICO for those who deal in drugs, and of course consistent with the new sentencing guidelines that Circuit Judge Wilkins is working so hard on, I would of course sentence appropriately under those guidelines.

The CHAIRMAN. Mr. Smalkin, the phrase, "judicial activism" is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority.

What does the phrase, "judicial activism," mean to you?

Mr. SMALKIN. Mr. Chairman, I think it has got several meanings. One of them of course is the tendency not to observe the careful separation of powers in the Federal Government and between the Federal and the State governments, remembering that the drafters of the Constitution framed the governmental system so that the Federal Government was one of limited powers and the States were ones, were the units, at least in theory, of unlimited power, except as specifically provided in the Constitution.

The other aspect of judicial activism that I think of when I look at the term is the temptation—and it is a temptation, I think—for Federal judges to substitute the wisdom of a decision that they make in solitude, in chambers, for—and also in hindsight—for a decision that is made in the legislative branch after the—all facets of the community have had input in a hearing, in lobbying, and in other legislative activities. Or in the executive branch, after something has been studied and public comment has been taken.

And I think that is a species of judicial activism that I have eschewed and would continue to do so.

The CHAIRMAN. The distinguished Senator from Illinois. Has he gone? He evidently has no questions for you. I congratulate you on your appointment and wish you happiness on the bench.

Mr. SMALKIN. Thank you, Mr. Chairman.

The CHAIRMAN. I believe that completes the hearing, so we now stand adjourned.

[Whereupon, at 2:59 p.m., the committee was adjourned, subject to the call of the Chair.]

BIOGRAPHIES

DIARMUID F. O'SCANNLAIN

NOMINEE, U.S. CIRCUIT JUDGE, NINTH CIRCUIT

Birth: March 28, 1937, New York, NY.

Legal Residence: Oregon.

Marital Status: Married. Maura Nolan O'Scannlain, 8 children.

Education: 1953-1957—St. John's College, B.A. degree. 1960-1963—Harvard Law School, J.D. degree. 1963-1965—New York University, School of Law (Graduate Division).

Bar: 1964—New York Bar. 1965—Oregon Bar.

Military Service: 1955-1978—United States Army Reserve & National Guard, Retired as Major.

Experience: 1963-1965—Standard Oil Co., New York, NY, Tax Department, Tax Attorney. 1965-1969—Davies, Biggs, Strayer, Stoel & Boley, Portland, OR, Associate. 1969-1971—Oregon Department of Justice, the Deputy Attorney General. 1971-1973—Public Utility Commissioner of Oregon. 1973-1974—Oregon Department of Environmental Quality, Director. 1975-1978—Keane, Harper, Pearlman & Copeland, Partner. 1978—present—Ragen, Roberts & O'Scannlain, Partner, now Ragen, Roberts, Tremaine, Krieger, Schmeer, O'Scannlain & Neill.

JAMES L. GRAHAM

NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF OHIO

Birth: April 20, 1939, Columbus, OH.

Legal Residence: Ohio.

Marital Status: Married. Phyllis Jean Graham, 4 children.

Education: 1957-1959—Ohio State University, B.A. degree. 1959-1962—Ohio State University, College of Law, J.D. degree.

Bar: 1962—Ohio.

Experience: 1962-1969—Dresbach, Crabbe, Newlon & Bilger, Law Clerk-1962, Associate 1962-1966, Partner 1967-1969. 1972-1973—Sole practitioner. 1970-1972—Graham & Dutro, Partner. 1973-1974—Graham & Nemeth, Partner. 1975-1978—Graham, Redick & Dutro, Partner. 1978—present—Graham, Dutro & Nemeth, Partner.

JAMES KENNETH PORTER

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF TENNESSEE

Birth: April 6, 1934, Newport, TN.

Legal Residence: Tennessee.

Marital Status: Married. Evelyn J. Rhodes, 2 children.

Education: 1952-1957—University of Tennessee, B.S. degree, LL.B. degree.

Bar: 1957—Tennessee.

Experience: 1957-1974—Private Practice. 1960-1964—Representative, General Assembly, State of Tennessee. 1972-1974—State Senator, State of Tennessee. 1974—present—Circuit Judge, Fourth Judicial District, State of Tennessee, (Presiding Judge 1984—present).

FREDERIC N. SMALKIN

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF MARYLAND

Birth: May 21, 1946, Baltimore, MD.

Legal Residence: Maryland. Valerie Leonhart Smalkin, 2 children.

Education: 1964-1968—John Hopkins University, B.A. degree. 1968-1976—U.S. Army, Captain.

Experience: 1971-1972—Law Clerk to Hon. Edward Northrop, U.S. District Judge, District of Maryland. 1972-1976—U.S. Army, Judge Advocate General Corps. 1976—Sole practitioner. 1977—present—U.S. Magistrate, District of Maryland. 1978-1981—University of Maryland, Lecturer.

CONFIRMATION HEARINGS ON: DOUGLAS H. GINSBURG, BRUCE M. SELYA, PATRICK J. DUGGAN, ALEX T. HOWARD, JR., JAMES R. SPENCER, JOSEPH F. ANDERSON, JR., JOHN L. NAPIER, AND JOHN PAUL WIESE

WEDNESDAY, OCTOBER 1, 1986

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 2:05 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Kennedy, Heflin, and Simon.

Staff present: Duke Short, chief investigator; Frank Klonoski, investigator; Melissa Nolan, investigative clerk; Reggie Govan, minority investigator; and Karen Kremer, minority counsel.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The **Chairman**. The committee will come to order.

Today we meet to hold hearings on a number of judges. First is Douglas Ginsburg, of the District of Columbia, to be U.S. Circuit Judge for the District of Columbia Circuit, vice J. Skelly Wright, retired.

Mr. Ginsburg, I believe you are here.

Mr. **Ginsburg**. Yes, sir.

The **Chairman**. You can come around to the table.

Now, I want to call the names of the others and we can swear all of you at one time.

Bruce M. Selya, of Rhode Island, to be U.S. Circuit Judge for the First Circuit vice a new position created by Public Law 98-353, approved July 10, 1984.

Bruce M. Selya, is he here?

Next is Joseph F. Anderson, of South Carolina, to be U.S. District Court Judge for the District of South Carolina, succeeding Judge Simons

Next is Judge Patrick Duggan, of Michigan, to be U.S. District Judge for the Eastern District of Michigan.

Next is Alex T. Howard, Jr., of Alabama, to be U.S. District Judge for the Southern District of Alabama;

James R. Spencer, of Virginia, to be U.S. District Judge for the Eastern District of Virginia;

U.S. Claims Court: John Napier, of South Carolina, to succeed Kenneth R. Hawkins;

John Paul Wiese, of Virginia, to be a judge of the U.S. Claims Court also.

Now, if all you gentlemen whose names I have called, one, two, three, four, five, six, seven, eight—are all eight of you here—I will swear you in. Raise your right hand and be sworn.

Will the testimony you give in this hearing be the truth, the whole truth, and nothing but the truth, so help you God?

NOMINEES. I do.

The CHAIRMAN. Have a seat and we will go right down the list. Now, I would like to take first the nominees whose Senators are here, so we will not detain the Senators. Senator Chafee, I believe you can come around with your man, if you want to. Mr Selya, if you will come around with Senator Chafee, he is going to make a statement in your behalf. Senator Pell is here, too, and we are very pleased to have both of you gentlemen here and we will be glad to hear from you now, Senator Chafee.

STATEMENT OF HON. JOHN H. CHAFEE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator CHAFEE. Thank you very much, Senator Thurmond and Senator Heflin and members of the committee. I want to first of all thank you very much for taking up the nomination of Judge Selya so rapidly. I am deeply appreciative for you, each of you, for doing this.

I have known Judge Selya for over 24 years. He is a graduate of Classical High School, in the city of Providence. He then attended Harvard as an undergraduate and graduated from the law school there, both magna cum laude. He received the John Harvard Scholarship as an undergraduate and received other scholarships while attending college.

He was a law clerk in Federal district court in Rhode Island and then was a practicing attorney from 1960 until he went on the bench just 4 years ago, recommended by this distinguished committee before he was confirmed in 1982 to the district court.

Mr. Chairman, Bruce Selya is not only a wonderful citizen of our State; he also was an outstanding lawyer during the time that he practiced law and then brought great distinction to the Federal District Court for the State of Rhode Island. It is with the highest of individual confidence that I recommend him to you.

Again, I thank you very much.

The CHAIRMAN. Thank you very much.

Senator Pell, we are now glad to hear from you.

STATEMENT OF HON. CLAIBORNE PELL, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator PELL. Thank you very much, Mr. Chairman. I second every word that my colleague said. Four years ago, we first confirmed Judge Selya for the Federal bench. He has performed well and with distinction since. He deserves his elevation and we in Rhode Island take great pride in him and I know that we in New

England will take equal pride in him as he undertakes his new task.

I am delighted to support his nomination.

The CHAIRMAN. Thank you very much. We are very pleased to have you here. I congratulate you, Mr. Selya. I congratulate you on being nominated by the President and having the full endorsement of both your Senators, one a Republican and one a Democrat, and so I think that speaks quite well of you and we are very pleased to have you.

We will now hear from the committee. Senator Kennedy?

Senator KENNEDY. Mr. Chairman, I appreciate being able to add a word of commendation for this nominee. He is well known to his future colleagues on the circuit court that sits in Boston. He is known both by reputation and by personal knowledge and awareness. They have expressed a strong sense of approval of this nominee and they are very hopeful that should we act favorably, and I am confident that we will, that he will be of a special addition to our circuit court.

We are in a situation where that vacancy in that court has been there for about a year. There is a very substantial backlog of work to be done in that court and I believe that this nominee can strengthen that court and can insure that the cause of justice will be well served by all of those in the circuit and I hope that we can act expeditiously to insure that that vacancy can be filled by someone who is as highly regarded as this nominee.

Thank you, Mr. Chairman.

The CHAIRMAN. Now, I thought we would take the Senators as quick as we can and let them go and then we will call each nominee up for any comments and the opportunity for questions at that time.

Senator PELL. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Now, the other Senators who are here who have judges are—Senator Kennedy, you are interested in Mr. Ginsburg, too, but since you are going to be here a little while, I will go ahead with the other Senators, or do you want to speak now?

Senator KENNEDY. Maybe if we have Mr. Ginsburg next.

The CHAIRMAN. Mr. Ginsburg, come around. I congratulate you upon being appointed by the President.

Mr. GINSBURG. Thank you, Senator.

The CHAIRMAN. You have done a fine job in the position that you are in now and I predict that you will make an excellent judge.

Senator Kennedy?

Senator KENNEDY. Mr. Chairman, I want to commend to the Judiciary Committee Mr. Ginsburg for the important position of service on the District Court of Appeals. He is no stranger to this committee. His qualifications have been reviewed by this committee and he has been approved by the U.S. Senate in the past when he was going for the responsible job as assistant to the Attorney General on antitrust matters.

Mr. Ginsburg comes now before this committee as someone who has achieved a very exemplary record in his academic life. He has served as a clerk not only in the circuit court but also in the Supreme Court under Thurgood Marshall. He has taught with distinction at Harvard Law School, where the areas which he focused on were Government regulation and antitrust policy and also on first amendment issues and questions.

His colleagues had a very high regard for both his teaching and for his contributions in terms of these subject matters. He has an insightful mind to deal with complex and involved fact situations and to be able to disect particular legal issues and questions with clarity and with a sense of compassion and with an understanding of the law.

I think all of us on this committee understand that that circuit court has very special responsibilities in a wide range of different public policy questions. I believe that, even though Mr. Ginsburg, in serving in the Justice Department has differed with some of those in the Congress on some of the complexities of antitrust laws, I have found him and I know that other members of the Judiciary Committee and the Congress have found him to be open-minded, to be willing to listen, and to be willing to consider views which he has not himself held.

I think we are fortunate to have this nominee for this extremely important position and, as I supposed his nomination before, I would hope that we would act and act expeditiously to assure that he can join his colleagues on the circuit court.

I see Mrs. Ginsburg here as well. We want to welcome her to these hearings and I hope we will act to approve him.

I have a statement by my colleague, Senator Kerry, in strong support of the nominee as well and I would ask that that also be included as part of the record.

The CHAIRMAN. Without objection, that will be placed in the record following your remarks.

[The prepared statement of Senator Kerry follows:]

PREPARED STATEMENT OF SENATOR JOHN KERRY

Mr. Chairman, I strongly support the nomination of Douglas Ginsburg to be a Judge of the United States Court of Appeals for the District of Columbia Circuit.

I commend the President for making this nomination. It is no secret that questions have been raised regarding the qualifications of some of the President's nominees to the federal bench. In this case, however, there can be no such questions.

Douglas Ginsburg brings the highest possible degree of qualifications to become a member of the federal judiciary. And he has the additional virtue of being a former resident of the state of Massachusetts.

Douglas Ginsburg has a record of academic and legal distinction. He is a graduate of Cornell University, and of the University of Chicago Law School, where he received numerous honors and awards. He clerked from 1973-74 for Judge Carl McGowan on the U.S. Court of Appeals for the D.C. Circuit, the same court where he now joins Judge McGowan as a colleague. He also clerked from 1974-75 on the United States Supreme Court for Justice Thurgood Marshall. So he clearly cannot be accused of having a bias against the "liberal" viewpoint on the Court.

From 1977 to 1983, Douglas Ginsburg served with distinction as Professor of Law at Harvard Law School. I know that he commands the greatest respect from our mutual friends at Harvard such as Alan Dershowitz and Larry Tribe. Alan has indicated to me that he regards Doug Ginsburg as a legal scholar of the highest order—non-ideological, non-polemical, and the best possible nomination that the President could make for the federal judiciary.

Mr. Ginsburg also served ably in the Office of Management and Budget during 1984-85 as an Administrator. Since September 1985, he has served as Assistant Attorney General for the Anti-Trust Division, where he has been involved with criminal and civil law enforcement, as well as participation on behalf of the Department of Justice in the rulemaking proceedings of all major Federal agencies.

Mr. Chairman, there could be no more highly qualified candidate for a judgeship on the U.S. Court of Appeals for the D.C. Circuit than Douglas Ginsburg. On that court, he will join the ranks of such eminent judges and senior judges as David L. Bazelon, J. Skelly Wright, Abner J. Mikva, Patricia M. Wald, and Robert H. Bork. I am confident that he will meet the high standards set by those distinguished jurists, and that he will be a fine addition to the court. I welcome the nomination of Douglas Ginsburg, and I hope that it will meet with unanimous approval by this Committee.

The CHAIRMAN. Mr. Ginsburg, thank you very much. Now, we come back to you in a few minutes.

Mr. GINSBURG. Thank you.

The CHAIRMAN. I want to accommodate Senators as much as I can.

Senator Hollings?

Mr. Anderson, if you will come around.

Senator Hollings?

Congressman Tallon, you are here and have Mr. Anderson, too. Congressman, did you want to speak for Mr. Anderson or Mr. Napier, or both?

Mr. TALLON. I would like to speak for both.

The CHAIRMAN. All right. Good.

John Napier, if you will come around at the same time, then.

Senator Hollings, we would be very pleased to hear from you in behalf of Mr. Anderson.

STATEMENT OF HON. ERNEST F. HOLLINGS, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator HOLLINGS. Mr. Chairman, he graduated from Strom Thurmond High School, and I guess that is about all I need to say.

The CHAIRMAN. That is a pretty good recommendation, is it not? [Laughter.]

Senator HOLLINGS. In spite of that, he has an unusually outstanding record. And I am pleased to join the distinguished chairman in nominating him to the district bench. This gentleman had an outstanding academic record at Clemson University and a similar record at the University of South Carolina School of Law.

I am being very brief and ask that my statement be included with others here, in joining your nomination, Mr. Chairman.

He was the executive editor of the Law Review and also the chief justice of the Wig and Robe. I do not know how you can gain higher honor amongst your own colleagues. Similarly, in the State legislature, where he served three terms—as a Democrat—how about that? He is pretty good.

The CHAIRMAN. He is still a Democratic legislator, I believe.

Senator HOLLINGS. Yes, he made an outstanding legislator.

The CHAIRMAN. Well, he votes for me so that is a good recommendation. [Laughter.]

Senator HOLLINGS. Yes, sir, he has judgment. I have seen many straight A boys, but some of them graduate and then can't hack it. Joe Anderson is an exception. I have watched him with interest. His father was a classmate, an outstanding student himself, at the University of South Carolina Law School and an outstanding lawyer.

Mr. Anderson has shown balance and good judgment in his work at his law firm in Edgefield where he has gained broad experience in civil and criminal matters, corporate and individual representation. I had an opportunity to visit in that community just recently with you Senator. Tom McCain, who is now chairman of the Edgefield County Council and head of the NAACP there, praised Mr. Anderson heartily to me. Mr. Anderson has the respect of all the community. Only the distinguished chairman is held in higher regard in that particular community.

So let me ask unanimous consent that I put my full statement in the record and join in your nomination.

The CHAIRMAN. Thank you very much, Senator. Your entire statement will go in the record.

Mr. Anderson, in a few minutes, rather than doing it now, I will make a statement when I call you up. Now, while you are here, you wanted to speak on Mr. Anderson, Congressman Tallon?

STATEMENT OF HON. ROBIN M. TALLON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF SOUTH CAROLINA

Mr. TALLON. Mr. Chairman, I would just simply like to associate myself with the remarks of Senator Hollings. I had the extreme personal pleasure of serving with Mr. Anderson in the State legislature. We were close personal friends and he is one that I feel would be most qualified for this position.

Thank you.

The CHAIRMAN. Thank you very much, both of you, for speaking in behalf of Mr. Anderson.

Senator SIMON. If I could ask Senator Hollings one question.

The CHAIRMAN. Senator Simon.

Senator SIMON. This high school that the nominee graduated from, is this an accredited high school? [Laughter.]

The CHAIRMAN. The top of the list.

Senator HOLLINGS. It is outstanding academically and athletically, I can tell you that.

The CHAIRMAN. Thank you very much.

Mr. Anderson, if you want to drop back now, we will talk about Mr. Napier.

Senator Hollings, you wanted to——

Senator HOLLINGS. Yes, former Congressman Napier, I heartily endorse his nomination to the U.S. Court of Claims here, in Washington. This distinguished gentleman, in addition to his outstanding academic record at Davidson College and at the University of South Carolina School of Law had three important stints right here with the Senate Judiciary Committee where many of the members remember his outstanding service as minority counsel on the Administrative Practice and Procedure Subcommittee and then, in 1976 and 1978, on the Judiciary Antitrust and Monopoly Committee and on the Special Committee of Special Conduct which wrote our Code of Ethics for both Senators and Senate employees. Since then he has practiced for the past 10 years as an attorney in administrative procedure matters as well as general practice in the city of Bennettsville, SC. He has an outstanding civic record, heading up the Boys Scouts, the historical society, and many of the other things, and I wholeheartily endorse his nomination and I ask unanimous consent that my full statement be included in the record.

The CHAIRMAN. Thank you Senator, and without objection, your entire statement will go in the record.

[The prepared statement of Senator Hollings follows:]

PREPARED STATEMENT OF SENATOR ERNEST F. HOLLINGS

Mr. Chairman, it is with great pleasure that I join with Chairman Thurmond in endorsing the nomination of Joseph Anderson, Jr. to the Federal District Court bench.

I have known the Anderson family for years ever since I went to law school with his father, Joseph Anderson, Sr., and I can say without reservation that few people bring the outstanding qualifications to a judicial nomination that Joe brings to this one. He graduated from Clemson University and then went on to an outstanding career at the University of South Carolina School of Law where he was the Executive Editor of the South Carolina Law Review and the Chief Justice of the Order of the Wig and Robe.

After graduation, he began perhaps his most important preparation for a career in the courtroom, both as a lawyer and a judge, when he became Judge Haynsworth's law clerk. Judge Haynsworth was one of our most outstanding members of the bench and the opportunity to work with him and learn from him has certainly helped Joe to become an excellent trial attorney. For the last ten years, he has been practicing law with the family firm of Anderson, Anderson, and Anderson handling both civil and criminal matters.

As you can see, Joe Anderson, Jr., is highly qualified to join the Federal bench based on his fine educational record and his extensive experience in the courtroom, but one must look beyond that to understand the excellence he brings to his every endeavor. He has been a widely respected member of the South Carolina House of Representatives since 1981, and served on the Judiciary Committee there. He served in the U.S. Army Reserve as a Captain. In 1980, he was named one of the Outstanding Young Men in South Carolina by the Jaycees, and he is an Associate Lay Leader of the Edgefield Methodist Church.

Mr. Chairman, I heartily endorse the nomination of Joseph Anderson, Jr., to the Federal District Court for the District of South Carolina, and I look forward to his speedy confirmation.

I am pleased to join my senior colleague, Chairman Thurmond, in presenting the nomination of John L. Napier to the U.S. Court of Claims.

John has a wide range of legal and legislative experience that makes him an ideal choice for the Court of Claims. From 1972 to 1978 he served on the staff of my distinguished colleague, Senator Thurmond. From 1972 to 1973 he was minority counsel on Senate Judiciary Administrative Practice and Procedure Subcommittee. From 1973-1976 he was minority counsel on the Senate Veterans Affairs Committee. He had the same position from 1976-1978 on the Senate Judiciary Antitrust and Monopoly Subcommittee. He also served on the U.S. Senate Special Committee on Official Conduct which wrote a Code of Ethics for the United States Senate and its employees.

From January 1981 John began service as United States Representative from the Sixth District of South Carolina and served until January 1983. He was a member of the Agriculture Committee and the Veterans' Affairs Committee.

Since leaving Congress, John has been in private law practice in Bennettsville, South Carolina. His practice emphasizes property and administrative law in Washington and in Columbia, South Carolina, before Federal agencies and the United States Congress.

John graduated from Davidson College in 1969 and the University of South Carolina Law School in 1972. He was commissioned a Second Lieutenant upon graduation from the ROTC Program at Davidson and served in the Army Reserves until he was honorably discharged in 1977 as a First Lieutenant.

As an active member of the Community, John has served as Campaign Chairman and President of the Marlboro County United Way. From 1978 to 1980, he was President of the Marlboro Historical Society. During the same period of time, he served on the Executive Committee of the Pee Dee Area Boy Scouts of America.

John is married to Pamela Caughman Napier. They live with their daughter in Bennettsville, South Carolina.

Mr. President, it should be plain to everyone that Mr. Napier has broad experience as an attorney in private practice and as a legislator, and I wholeheartedly endorse his nomination.

Congressman Tallon, we will be glad to hear from you now.

Mr. TALLON. Thank you, Mr. Chairman. It is a real special privilege for me to appear before the committee today, Senator Heflin, Senator Kennedy, Senator Simon, Senator Denton, on behalf of a very close personal friend of mine. Mr. Napier and I have known each other both personally and politically, and I could not more highly recommend him to the position for which he is before you today.

Senator Hollings asked me to just mention that I might sit up here and try to act like a Congressman. It is a great pleasure for me to come before this committee and an honor to be here with a person that I have dealt with over the past years as I have with Congressman Napier, and I support his nomination.

Senator HOLLINGS. He did served with us, of course, in the Congress in an outstanding manner.

The CHAIRMAN. I want to congratulate you, Congressman Tallon, for coming over here. Mr. Napier was a Congressman from that district and the last time you defeated him, so I think that shows the magnanimous spirit on your part. It shows that you respect him and you have taken time to come over here and endorse him, and I want to thank you very much for doing that.

Senator Hollings, I want to thank you for your appearance. I know how busy you are and we appreciate your coming and recommending both of these gentlemen so highly.

Senator HOLLINGS. Thank you very much, Mr. Chairman.

Mr. TALLON. Thank you, Senator.

The CHAIRMAN. If you all will stand aside, we will come back to you.

Senator Denton is a member of this committee. We will take his man next, Mr. Howard.

Senator HEFLIN. Alex T. Howard, Jr., of Alabama.

Senator DENTON. Thank you, Mr. Chairman. It is a pleasure for Senator Heflin and me today to welcome to this committee a distinguished fellow Alabamian, Alex T. Howard, Jr., from Mobile. He is President Reagan's nominee to serve as a district court judge for the Southern District of Alabama.

I offer my personal welcome to you, Alex, along with the others to you and your fine family, whom I see back there. It is an honor to have before this committee a fellow Alabamian whose professional and public service has been so extraordinarily varied and complete.

Mr. Chairman, this man did some heavy combat duty in the European Theater in World War II. He attended the University of Alabama after that and went on to attend law school at Vanderbilt University. He was graduated in 1950. After graduation, he served as a United States Probation Officer for the Southern District of Alabama. In June of 1951 he became associated with the law firm of McCorvey, Turner, Rogers, Johnstone and Adams, one of the best in the area. In 1957 he was made a partner and has practiced to date with that firm, which now does business under the name of Johnstone, Adams, Howard, Bailey and Gordon.

During his tenure with that firm, he has worked in a very versatile manner and has developed an expertise in admiralty law, with an emphasis on litigation He has also been involved to a significant degree in general litigation, including product liability, aviation and contract law.

The committee has always taken an exceedingly close look at all the facets of what it takes to make an excellent Federal judge. In particular, we look at three criteria particularly closely, nominee professional competence, personal integrity, and fidelity to the Constitution. Without exception, Alex Howard has all of these.

Regarding his professional competence, the American Bar Association evaluating Alex Howard's qualifications unanimously found him to be "well qualified " In his over 35 years of private practice, Alex Howard has served as sole chief or associate counsel in well over 500 cases, with approximately 150 of those cases being tried to verdict or judgments. Many of the cases involved various types of litigation, both Federal and State, covering hundreds of depositions, thousands of hours of discovery and numerous briefs, motions and pleadings. I do not have precise figures, but one could speculate that Alex Howard has probably argued more cases in the Federal courts of appeal than any other lawyer in Mobile County.

I will ask that the entire written statement be included in the record, Mr. Chairman.

The CHAIRMAN. Without objection, the entire statement will go in the record

Senator DENTON. Mr. Howard is a fellow in the International Society of Barristers and has served as the U.S. Delegate to several international maritime conventions.

As to the second criterion, personal integrity, in word and in deed he has the highest order of personal integrity and that is without question in his reputation and is manifest in everything about the man.

A third and not the least criterion by which we evaluate a candidate is the person's fidelity to the Constitution and to legal precedent. Alex Howard, by his record, has been committed to an even application of the law without imposing his personal views on a decision. Furthermore, he believes in the principle of judicial restraint, realizing the balance of power can only be maintained when the Judicial Branch adheres to its job as interpretor of the law and avoids the temptation to legislate.

Apart from his distinguished service at the bar, Mr. Chairman, Alex Howard has given much of his time to community service. He has served as a trustee of Diffinway United Methodist Church, president of Child and Family Service of Mobile County, as incorporator and director of the Family Counseling Center of Mobile, and as incorporate and director of the Mobile Chapter of Epilepsy Foundation.

Alex Howard has also helped every major office in the Mobile Bar Association, serving as president in 1973. So it is with great price, Mr. Chairman, and my colleagues on the committee, that I recommend this extraordinary and highly qualified gentleman to the committee for our approval as a United States District Judge for the Southern District of Alabama.

Thank you, Mr. Chairman.

The **Chairman**. Senator, did you cover your statement or do you have more to go in the record?

Senator **Denton**. I have some more to go in the record.

The **Chairman**. Without objection, it will be placed in the record.

[The prepared statement of Senator Denton follows:]

STATEMENT BY THE HONORABLE JEREMIAH DENTON BEFORE THE SENATE JUDICIARY COMMITTEE IN SUPPORT OF THE NOMINATION OF ALEX T. HOWARD, JR. TO SERVE AS JUDGE FOR THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF ALABAMA

1 October 1986

Mr. Chairman:

It is an honor and a pleasure today to welcome to this Committee a distinguished fellow Alabamian, Alex T. Howard, Jr., of Mobile, who is President Reagan's nominee to serve as District Court Judge for the Southern District of Alabama. Mr. Howard comes to us highly qualified to serve as a District Court Judge, and we are fortunate to have him before us today.

Alex, I offer my personal welcome to you and your fine family. It is always an honor to have before this Committee a fellow Alabamian whose professional and public service has been so extraordinarily varied and complete.

Mr. Chairman, after completing his service in the European theater in World War II, Alex Howard attended the University of Alabama. He went on to attend law school at Vanderbilt University and was graduated in 1950. After graduation, he served as a United States Probation Officer for the Southern District of Alabama.

In June of 1951, Alex Howard became associated with the Mobile law firm of McCorvey, Turner, Rogers, Johnstone and Adams. In 1957, he was made a partner and has practiced to date with

THAT FIRM, WHICH NOW DOES BUSINESS UNDER THE NAME OF JOHNSTONE, ADAMS, HOWARD, BAILEY AND GORDON. DURING THIS TIME, HE HAS WORKED IN VARIED AREAS OF LAWS BUT HAS DEVELOPED AN EXPERTISE IN ADMIRALTY LAW WITH AN EMPHASIS ON LITIGATION. HE HAS ALSO BEEN INVOLVED TO A SIGNIFICANT EXTENT IN GENERAL LITIGATION, INCLUDING PRODUCTS LIABILITY, AVIATION AND CONTRACT LITIGATION.

MR. CHAIRMAN, THIS COMMITTEE HAS TAKEN AN EXCEEDINGLY CLOSE LOOK AT ALL THE FACETS THAT MAKE AN EXCELLENT FEDERAL JUDGE. IN PARTICULAR, WE HAVE STRESSED A NOMINEE'S PROFESSIONAL COMPETENCE, PERSONAL INTEGRITY, AND FIDELITY TO THE CONSTITUTION. ALEX HOWARD HAS ALL OF THESE.

OUR ANALYSIS OF A NOMINEE'S PROFESSIONAL COMPETENCE HAS COVERED SUCH AREAS AS LENGTH, BREADTH AND DEPTH OF LEGAL EXPERIENCE, WRITING SKILLS, AND CONTRIBUTIONS TO LEGAL SCHOLARSHIP. ALEX HOWARD'S RECORD IS A STELLAR ONE IN TERMS OF HIS LEGAL EXPERIENCE, AND IS EXEMPLARY OF THE KIND OF BACKGROUND WE LOOK FOR IN FEDERAL JUDICIAL NOMINEES. IN FACT, THE AMERICAN BAR ASSOCIATION IN EVALUATING ALEX HOWARD'S QUALIFICATIONS FOUND HIM TO BE "WELL-QUALIFIED."

IN HIS OVER THIRTY-FIVE YEARS OF PRIVATE PRACTICE, ALEX HOWARD HAS SERVED AS SOLE, CHIEF OR ASSOCIATE COUNSEL FOR WELL OVER 500 CASES, WITH APPROXIMATELY 150 OF THOSE CASES BEING TRIED TO VERDICT OR JUDGEMENT. MANY OF THESE CASES INVOLVED VARIOUS TYPES OF LITIGATION, FEDERAL AND STATE, COVERING HUNDREDS OF

DEPOSITIONS, THOUSANDS OF HOURS OF DISCOVERY, AND NUMEROUS BRIEFS, MOTIONS AND PLEADINGS.

ALEX HOWARD ALSO SERVED AS A PART-TIME UNITED STATES COMMISSIONER FOR THE SOUTHERN DISTRICT OF ALABAMA FROM 1956 TO 1970.

MR. CHAIRMAN, THE WRITING SKILLS PORTRAYED BY MR. HOWARD IN THE QUESTIONNAIRE HE PREPARED FOR THIS COMMITTEE ARE TO BE ADMIRED AND EVEN ENVIED. HIS CASE DESCRIPTIONS AND ESSAY RESPONSES NOT ONLY SERVE AS AN EXCELLENT SUMMARY OF HIS EXTENSIVE TRIAL PRACTICE BUT REFLECT A CLEAR, THOUGHTFUL, AND TIGHTLY WORDED WRITING STYLE WHICH WILL SERVE HIM WELL AS A DISTRICT COURT JUDGE.

MR. CHAIRMAN, A NOMINEE'S PERSONAL INTEGRITY MUST BE CLOSELY MEASURED WHEN BEING CONSIDERED FOR A FEDERAL JUDGESHIP. IN WORD AND IN DEED, ALEX HOWARD'S INTEGRITY IS OF THE HIGHEST. HIS INTEGRITY IS RELECTED IN HIS ATTITUDE AND DESIRE TO SERVE AS A JUDGE WITHOUT INTERFERENCE OR CONFLICT OF INTEREST.

THE THIRD AND CERTAINLY NOT THE LEAST CRITERION BY WHICH WE SHOULD EVALUATE A CANDIDATE FOR A JUDGESHIP IS THAT PERSON'S FIDELITY TO THE CONSTITUTION AND TO LEGAL PRECEDENT. ALEX HOWARD IS COMMITED TO AN EVEN APPLICATION OF THE LAW WITHOUT IMPOSING HIS PERSONAL VIEWS ON A DECISION. FURTHERMORE, HE BELIEVES IN THE PRINCIPLE OF JUDICIAL RESTRAINT, REALIZING THAT A BALANCE OF POWER CAN ONLY BE MAINTAINED WHEN THE JUDICIAL BRANCH ADHERES TO

ITS JOB AS INTERPRETER OF THE LAW AND AVOIDS THE TEMPTATION OF LEGISLATING.

MR. CHAIRMAN, APART FROM HIS DISTINGUISHED SERVICE AT THE BAR, ALEX HOWARD HAS GIVEN MUCH OF HIS TIME TO COMMUNITY SERVICE. HE HAS SERVED AS A TRUSTEE OF DAUPHIN WAY UNITED METHODIST CHURCH; DIRECTOR OF TRAVELERS AID; PRESIDENT OF CHILD AND FAMILY SERVICE OF MOBILE COUNTY AND THE MOBILE CHAPTER OF EPILEPSY FOUNDATION.

ALEX HOWARD HAS ALSO HELD EVERY OFFICE IN THE MOBILE BAR ASSOCIATION, SERVING AS PRESIDENT IN 1973.

MR. CHAIRMAN, IT IS WITH GREAT PRIDE THAT I RECOMMEND THIS EXTRAORDINARY AND HIGHLY QUALIFIED GENTLEMAN TO THE COMMITTEE FOR OUR APPROVAL AS A UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF ALABAMA.

THANK YOU, MR. CHAIRMAN.

The CHAIRMAN. A distinguished member of this committee, Judge Heflin, we would be glad to hear from you.

Senator HEFLIN. Mr. Chairman, rather than giving my prepared statement, which would contain a great number of reptitious biographical achievements on the part of Alex Howard, I could have it submitted for the record and published in full as if given.

The CHAIRMAN. Without objection, so ordered.

Senator HEFLIN. I would like to say that Alex Howard is a rare and unusual lawyer. He has been rated well qualified by the American Bar Association and, as Senator Denton mentioned, he is a member of the International Society of Barristers which is an organization that selected from the entire world only 300 lawyers whom they have recognized. Membership is limited to 300 and Alex has been a member of that organization for a number of years. I might say that it is so exclusive an organization that there is only one member of Congress that belongs.

Mr. Howard and I have been friends for a long time. We, in fact, may even be kin. I have a great number of cousins that are cousins of his. In fact, my Mobile staff director, Bob Morrisette is his cousin, and my Mobile finance chairman, Taylor Morrisette, is his first cousin so we feel like he belongs to the family. I congratulate the President and Senator Denton on this outstanding nomination.

Thank you.

The CHAIRMAN. Thank you, Senator. Who is the Member of Congress who is the only one who is a Member?

Senator HEFLIN. Well, I would not want to say. [Laughter.]

Senator DENTON. Mr. Chairman, in counter to that, I will say that, as maybe Alex would have said, I was invited along with Al when he was already a Senator and I was not to be a speaker in some exotic island in the Caribbean, and I did win their tennis tournament, the International.

[Laughter.]

The CHAIRMAN. Thank you very much.

[The prepared statement of Senator Heflin follows:]

PREPARED STATEMENT OF SENATOR HOWELL HEFLIN

Mr. Chairman, I would first like to welcome Alex Howard and his wife to today's hearing.

I am both pleased and honored to introduce Alex T. Howard, Jr. to the Senate Judiciary Committee.

Alex Howard attended both the University of Alabama and Auburn University for his undergraduate studies. But, World War II interrupted his education. He entered the Army in June of 1943 and fought bravely for our country in Europe. Alex came home from World War II a second lieutenant and entered Vanderbult University's Law School.

Since graduating from Vanderbilt in 1950, Alex Howard has acquired 35 years of legal experience in the private practice of law. Alex has engaged in an extremely broad general practice with an emphasis in litigation—and during the last couple of years he has specialized in admiralty law litigation. His practice has been equally divided between the Federal courts and State courts. These legal skills should enable Alex to serve well the people of Mobile and the Southern District of Alabama, where he will sit on the Federal bench.

I have known Alex Howard for many years. We have been fellows of the International Society of Barristers together for a number of years. I may even be kin to him. We have never traced it, but numerous cousins of mine are his cousins. My Mobile staff director, Bob Morrisette, is his first cousin.

I believe strongly that if we desire for our society to be bound by the "rule of law", then we must exercise extreme caution in choosing those individuals who will be interpreters of that law. An old proverb states that "a good judge conceives quickly, slowly." It is my firm belief that in Alex Howard the President has found an individual who will bo both.

But, my support of Alex Howard is not based solely on his vast legal exerience, for it takes more than pure knowledge to make a good judge. Alex has also been active in his community. He is a founder and director of both the family counseling service and the epilepsy foundation in Mobile. Further, he has made time throughout his legal career to do pro bono work for the less fortunate members of his community. This nominee brings a wealth of well-rounded experience to the bench.

The American Bar Association unanimously found him "well qualified." I believe that the Judiciary Committee and the full Senate will also find him fully qualified and vote to confirm him.

Alex, I know you will serve both the Federal judiciary and the men and women of the Southern District of Alabama with distinction. Good luck!

The CHAIRMAN. Thank you very much, gentlemen, for appearing in his behalf.

Mr. Howard, would you step back now. Senator Warner, if you will come around now, and James R. Spencer, and Lieutenant Governor. Wiley, if you will come around, too.

STATEMENT OF HON. JOHN WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Thank you, Mr. Chairman. I have asked the Governor to join me.

The CHAIRMAN. We are very glad to hear from you. Mr. Trible is going to be here, Senator Warner?

Senator WARNER. Not to my understanding.

The CHAIRMAN. How is that?

Senator WARNER. No, he is not coming.

The CHAIRMAN. I just asked you if Mr. Trible was coming.

Senator WARNER. To my understanding, he is otherwise detained.

The CHAIRMAN. He is tied up?

Senator WARNER. Yes.

The CHAIRMAN. I see.

Senator WARNER. Mr. Chairman and members of the committee, it is a privilege for me to introduce to the committee James Randolph Spencer, the President's nominee for a Federal District Judge in the eastern district of Virginia. It is also a privilege to me to introduce members of his family who have accompanied today the nominee.

First, his wife, Margaret and one of his sons, Benjamin.

Mr. Chairman, I have invited our distinguished Lieutenant Governor to appear with me for the purpose of this introduction and we also have with us today—and I urge the committee to receive their statements at an appropriate time, Mr. John Scott, the president of the Old Dominion Bar Association. I shall incorporate in my statement a letter that Mr. Scott sent me on behalf of the nominee which initiated this rather long process by which we are gathered here today.

Also we have Mr. Raymond Jackson, past president of the Old Dominion Bar Association, speaking on behalf of the National Bar Association, and Mr. William Dade, of the Old Dominion Bar Association.

Members of the committee should also have received by now the statement on behalf of Mr. Spencer from Mr. Edmond L. Walton who is president of the Virginia Bar Association. I follow the practice, Mr. Chairman and members of the committee, of inviting the star bar association to assist me in nominating individuals to the President, recommending them.

Now, I hesitate to advise the Chairman of this fact, for fear that you will take some credit here, but this nominee originally came back from.

The Chairman. He was born in South Carolina.

Senator Warner. Yes, I was doing my best to obscure that fact, but—very well. I thank the Chair.

Mr. Spencer received his undergraduate degree from Clark, University, In Atlanta, GA, and his law degree in 1974 from Harvard University. In addition to his legal education, this distinguished nominee earned a divinity degree from Howard University here in Washington, DC, and is very active today in all forms of church work.

After graduation from law school, Mr. Spencer worked with the Legal Aid Society in Atlanta, and served in the United States Army Judge Advocate General's Corps. Mr. Spencer was a prosecutor in the U.S. attorneys office in the District of Columbia, and since November 1983 has been an assistant U.S. attorney in Richmond, VA.

Mr. Spencer has earned respect as an able prosecutor and has proven himself to be an intelligent, diligent trial lawyer. I am confident that he possesses the character and the judicial temperament necessary to fairly and impartially render equal justice to all. I look forward to his confirmation and his contributions to the judiciary and to the citizens of Virginia and the citizens of the United States in his career on the Federal bench.

I must say, Mr. Chairman, I would like to add that when I worked in checking his credentials, I talked to a number of sitting Federal judges in the Commonwealth of Virginia and, without exception, these outstanding jurists said this man potentially will make a very fine judge. It is based largely on those recommendations that I recommended to the President this nominee.

I thank the Chairman, and Governor Wilder, you will make your statement at this time.

The Chairman. Governor Wilder, we will be glad to hear from you.

STATEMENT OF LIEUTENANT GOVERNOR DOUGLAS C. WILDER, COMMONWEALTH OF VIRGINIA

Mr. Wilder. Thank you very much, Mr. Chairman and members of the committee. It is good to have an occasion to be here to join my good friend, Senator Warner, and endorse the candidacy of Jim Spencer.

First of all, his qualifications as well as the suggestion by Senator Warner and the nomination by the President bring a uniqueness to Virginia that bodes well for the Commonwealth. His qualifications, as the Senator has spoken, speak for themselves. He is a magna cum laude graduate of Clark University and College in Atlanta, GA. He is a cum laude graduate of Harvard Law School.

He was a military judge during that time and has been, as indicated, a skilled prosecutor in the U.S. Attorneys Office, so skilled in fact that I never won a case against him when I was representing the other side. Yet, he has been fair. I suggest that he will always uphold the fine traditions of the judiciary in terms of interpreting the law as it is, rather than the subjecting of his personal whims. It is a good omen for things to come and a much heralded thing in Virginia that we would have this, what I would call, sterling candidate to sit on our judiciary.

I thank you for the opportunity of being here today and look forward to seeing him have an excellent tenure. Thank you.

The CHAIRMAN. We are pleased to have you here, Governor.

Mr. WILDER. Thank you, sir.

The CHAIRMAN. Mr. Spencer, based upon your fine South Carolina upbringing, I would say that Senator Warner has made an outstanding choice in recommending you to President Reagan. I am confident you will make an excellent Federal district court judge and I congratulate Senator Warner upon his selection. Mr. Trible also has approved you, too, so I want you to know that you not only have been recommened to the Senate by President Reagan but both your Senators have endorsed you highly.

Mr. SPENCER. Thank you very much.

The CHAIRMAN. We thank you, Senator Warner, for your presence. I know how busy you are.

Senator WARNER. Thank you.

The CHAIRMAN. The 5-minute bell has rung, if you could do it in about a minute and a half and put it in the record.

Senator WARNER. Thank you, Mr. Chairman.

The nominee has served with distinction since being appointed to the claims court. He possesses the necessary experience, ability and integrity essential for this position. Since his original graduation from the University of Virginia Law School in 1965, he has focused his entire career on the work of that court. I submit the balance for the record.

[The prepared statement of Senator Warner follows:]

PREPARED STATEMENT OF SENATOR JOHN WARNER

Mr. Chairman, members of the committee it is a privilege for me to introduce to the Committee James Randolph Spencer as the nominee for a judgeship in the United States District Court for the Eastern District of Virginia. It is an equal pleasure to introduce the members of Mr. Spencer's family accompanying him today: His wife Margaret and one of his sons, Benjamin.

In addition, Mr. Chairman, I am pleased to be accompanied today in appearing before the Committee by the Lieutenant Governor of the Commonwealth of Virginia, the Honorable Doug Wilder; John Scott, the President of the Old Dominion Bar Association; Raymond Jackson, past President of the Old Dominion Bar Association Speaking on behalf of National Bar Association; and, William Dade of the Old Dominion Bar Association. Members of the Committee should also have received written testimony in support of Mr. Spencer from Edmund L. Walton, Jr., President of the Virginia Bar Association.

Though originally from Florence, South Carolina, Jim Spencer is now a resident of the Commonwealth of Virginia, in Richmond. Mr. Spencer received his undergraduate degree from Clark University in Atlanta, Georgia, and his law degree in 1974 from Harvard University Law School. In addition to his legal education, Mr. Spencer earned a divinity degree from Howard University here in Washington, D.C.

After graduation from law school, Mr. Spencer worked for the Legal Aid Society in Atlanta, and served in the Army Judge Advocate General's Corps. Mr. Spencer was a prosecutor in the U.S. Attorney's office in the District of Columbia, and since November of 1983, has been an Assistant U.S. Attorney in Richmond, Virginia.

Jim Spencer has earned respect as an able prosecutor, and has proven myself to be an intelligent, diligent trial lawyer. I am confident that he possesses the character and judicial temperament necessary to fairly and impartially render equal justice. I look forward to Mr. Spencer's contributions to the judiciary and to the citizens of Virginia as he begins his career on the Federal bench.

Appearing before the Committee today is a double honor. Mr. Chairman, because I also have the pleasure of introducing Judge John Paul Wiese, nominee for reappointment to the United States Claim Court.

Judge Wiese has served with distinction since being appointed to the Claims Court. He possesses the necessary experience, ability and integrity essential to the Court. Since his graduation from the University of Virginia Law School in 1965, he has focused his entire carreer on that Court on which he now serves and on the specialized litigation for which that Court provides exclusive forum. I am honored to be in the company of the Honorable Alex Kozinski, Chief Judge of the Claims Court, in recommending Judge Wiese for reappointment.

Mr. Chairman, Members of the Committee, you have before you two honorable, capable, worthy men. I urge you to lend your support to them as they respectively take the bench and re-take the bench, subject to the approval of this Committee.

OLD DOMINION BAR ASSOCIATION

November 13, 1985

REPLY TO
John W. Scott, Jr., Esquire
510 Princess Anne Street
Suite 200
Fredericksburg, Virginia 22401

To The Honorable John Warner, Senator
United States Senate
Washington, D.C. 20510

Re: Nomination of the Old Dominion Bar Association of a Candidate for the Federal Judiciary

Dear Senator Warner:

I am writing in my capacity as First Vice President and Chairman of the Judicial Selection Committee of the Old Dominion Bar Association to urge that you nominate James Randolph Spencer, Esquire, to fill the vacancy on the United States District Court, for the Eastern District of Virginia. The Old Dominion Bar Association, after considering many qualified candidates for this position, has selected Mr. Spencer to be our nominee.

We are fully aware of your desire to eliminate one of the last vestiges of racial segregation in the Commonwealth of Virginia. We urge you to, therefore, take this opportunity to appoint Mr. Spencer to the Federal Judiciary. We believe that Mr. Spencer is imminently qualified for the position and would serve the United States as a Federal Judge in an exemplary fashion. I am enclosing a copy of Mr. Spencer's resume for your review and to assist in your preliminary investigation of this candidate.

We look forward to hearing from you as to your decision concerning this nominee.

Very truly yours,

John W. Scott, Jr.
First Vice President and Chairman,
Judicial Selection Committee

cc: Raymond Jackson, Esquire
President
Old Dominion Bar Association

The **Chairman**. Thank you.

Judge Wiese, we congratulate you upon your appointment and congratulate you upon being recommended so highly by the able Senator from Virginia, Mr. Warner, and also by being approved by Mr. Trible, too.

We have got to go and vote, so we will take a recess. Senator Levin, could you do it in a minute and a half, you and Senator Riegle?

Senator **Levin**. Yes.

The **Chairman**. Thank you very much. If you just put it in the record, then we will not have to come back.

We are now very pleased, Mr. Patrick Duggen of Michigan, Senator Riegle and Senator Levin, we are glad that you could come.

STATEMENT OF HON. DONALD W. RIEGLE, JR., A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator **Riegle**. We will be very brief, Mr. Chairman.

The **Chairman**. And Congressman Pursell, too, I believe.

Senator **Riegle**. Thank you. We feel we have an outstanding nominee here in the person of a long and distinguished career in community service and the practice of law and on the circuit bench in the Detroit area. He has the highest reputation, and is considered to be very competent by his fellow judges and lawyers in Michigan. He has conducted his court with dignity and professional objectivity and we think he will make a fine Federal judge and we are here to endorse him today.

The **Chairman**. Thank you very much, Senator, and we will put your entire statement in the record.

[The prepared statement of Senator Riegle follows:]

PREPARED STATEMENT OF SENATOR RIEGLE

Mr. Chairman:

Thank you for the opportunity to introduce to this Committee one of my distinguished constituents, the Honorable Patrick J. Duggan. ([redacted]) Judge Duggan comes before this Committee today as the nominee to fill the vacancy on the United States District in Michigan's Eastern District.

Judge Duggan was raised and educated in Michigan and has been an active member of the legal community in my state for over twenty years. His career has included 27 years in private practice with the law firm of Brashear, Duggan, Conley & Tangora in Detroit. Upon leaving private practice in 1977, Judge Duggan became Circuit Judge in Wayne County and has been Circuit Judge since 1977.

In his position as a Federal Circuit Judge, Judge Duggan does have the highest reputation and is considered to be very competent by judges and lawyers in Michigan. He has conducted his court with dignity and professional objectivity.

Patrick Duggan has the experience, the judgement, and sense of fair play one looks for in a candidate for a Federal judge. I urge you to favorably report his nomination.

STATEMENT OF HON. CARL LEVIN, A U.S SENATOR FROM THE STATE OF MICHIGAN

Senator **Levin**. Mr. Chairman, we are delighted with this appointment. Pat Duggan has made a wonderful judge in the Wayne County Circuit Court. His colleagues there as well as his future colleagues in the eastern district all endorse this nomination.

I have known him for about 25 years. He has been a circuit court judge for about 10. He has the highest integrity and independence and he is going to make a terrific Federal court judge.

He is here today with his wife Joan and their five sons. I wonder if we could just take 2 seconds of our 1 minute and introduce his wife and five sons who are with him today.

The **Chairman**. We are going to introduce all of the families today. It would be all right if you hurry.

Senator **Levin**. Real good, and they can stand again later. That will give them two chances.

The **Chairman**. Thank you.

Senator **Levin**. And although he was not born in South Carolina, he has made up for that ever since, Mr. Chairman. Congressman Pursell is also with us today to join in our endorsement of him.

Thank you.

The **Chairman**. Thank you very much, Senator. We are very pleased and thank you gentlemen for coming in personally, you, Senator Riegle and Congressman Pursell. To save time, I am going to go vote and I will just ask the chief counsel here to hear your statement.

STATEMENT OF HON. CARL D. PURSELL, A U.S. REPRESENTATIVE FROM THE STATE OF MICHIGAN

Mr. **Pursell**. Thank you, Mr. Chairman. I too want to congratulate Patricia Duggan and his wife and family. They have been a great credit to the State of Michigan and on behalf of the Michigan congressional delegation there is unanimous support recommending the nomination and confirmation of Patrick Duggan to a Federal judgeship for the eastern district of Michigan.

I have been pleased to know him for over 20 years as a community leader. His family has made a contribution to the growth and development of Livonia, one of the largest cities in the State of Michigan. I too am proud to add my name as one of Judge Duggan's supporters and recommend his confirmation by the U.S. Senate.

Thank you very much.

Mr. **Short**. Thank you very much, Congressman Pursell.

The committee now stands in recess.

[Short recess.]

Senator **Heflin**. The committee will come to order.

Senator Thurmond has asked me to preside until he can return.

Mr. Ginsburg, if you will come to the witness table, we will begin with you and perhaps you would like to introduce the members of your family who are present and make any opening statement that you would like.

TESTIMONY OF DOUGLAS H. GINSBURG, OF THE DISTRICT OF COLUMBIA, TO BE U.S. CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mr. **Ginsburg**. Thank you, Mr. Chairman. I would very much like to introduce, if I may, my wife who is here, Hallee Morgan. Sitting next to her is my deputy, Stephen Cannon, who is a person familiar to members of this committee, was a former staffer here.

Senator, I just want to say how pleased and honored I am to have been nominated by the President, to have this opportunity to testify here and to answer any questions that you or members of the committee would like to discuss.

Senator **Heflin**. Mr. Ginsburg, you previously served as Assistant Attorney General for the Antitrust Division of the Department of Justice, and from 1977 to 1983 you were a member of the Harvard Law School faculty. How do you personally feel about your own capacity, at this point in your career, to carry out the very significant responsibilities and power of being a circuit court judge?

Mr. **Ginsburg**. Well, Mr. Chairman, I am optimistic about meeting this challenge. I think it is a challenge. I began my career in the law clerking on this court for Judge Carl McGowan, who is still active as a Senior Judge on the court, and in the 8 years that I spent at Harvard I taught subjects that are very germane to the work of this court, particularly involving Federal regulation and administrative decisions, and so I am looking forward to this as a challenge that I think I am now ready to meet and I appreciate the President's confidence in me.

Senator **Heflin**. I am asking these questions on behalf of the chairman. Mr. Ginsburg, would you tell the committee what procedures you would follow in determining any potential conflicts of interest and how you intend to resolve them?

Mr. **Ginsburg**. Certainly, Mr. Chairman. As I have at the Department of Justice, I would expect at the court that I would notify the chief judge or the clerk, as appropriate, of any entities or institutions whose interests I am sufficiently identified with and would like to be recused from all cases involving them directly. But in addition, I think the court, it is appropriate to follow the policy that I know Judge McGowan followed when he first joined the court, and that was to recuse myself also in cases that simply raised the issues on which I had an opportunity to speak and take a position during my time with the Department of Justice or beforehand. That will require me I think to identify issues carefully and err on the side of caution, and that would be my policy.

Senator **Heflin**. Mr. Ginsburg, the phrase "judicial activism" is often used to describe the tendency of judges to make decisions on issues that are not properly within their scope of authority. What does the phrase "judicial activism" mean to you?

Mr. **Ginsburg**. Mr. Chairman, I would identify two practices with that phrase, one of which is the gratuitous resolution of or reflection on issues that are not squarely presented to the court by the case at hand. That is a practice that I think should be avoided in every instance.

Second, I think the administration of complex decrees sometimes involves courts overzealously in the management of public and private institutions that are subject to their jurisdiction; if that administration could be accomplished by other branches of Government or there are private parties involved, then certainly courts should not jump too readily to that task.

Senator HEFLIN. Thank you, Mr. Ginsburg. You seem to have come through with flying colors and good luck to you the rest of the way.

Mr. GINSBURG. Thank you very much, Mr. Chairman.

Senator HEFLIN. Judge Selya, if you will, sir, please have a seat. If you would like to introduce members of your family or colleagues that are with you here that you feel——

TESTIMONY OF BRUCE M. SELYA, OF RHODE ISLAND, TO BE U.S. CIRCUIT JUDGE FOR THE FIRST CIRCUIT

Mr. SELYA. Senator, I would be proud to accept. Through the kindness of this committee, however, this hearing came about on such short notice that my wife and daughters are simply unable to be here. They are here in spirit, if that is helpful to anyone.

Senator HEFLIN. You are currently serving as U.S. District Judge for the District of Rhode Island. Would you please tell the committee what you consider to be the prerequisites for a just and fair judge?

Mr. SELYA. I think the overriding prerequisite is that special kind of fairness that results in objectivity and evenhandedness of treatment. I think, coupled with that, any judge worth his salt must have a love of the law, a love of people, a certain compassion, and fundamentally, an integrity both in terms of his personal values and in terms of his intellectual probity.

Senator HEFLIN. As an appellate judge you will be reviewing decisions of district court judges. I am sure you have been reviewed several times. What criteria do you intend to use in reviewing these decisions and trial records?

Mr. Selya I believe that as to matters of fact which have been heard in the trial court setting, whether by a trial judge or by a jury, that such findings of fact deserve considerable deference, and that the clearly erroneous rule means exactly that; they should not be set aside or reversed without good and compelling cause in the record of the case or unless they are unsupported in the record. I think in other areas, such as diversity jurisdiction, the appellate courts have to recognize the special expertise that district judges from particular locales may have in the law of their particular States.

Apart from considerations such as those, I think appellate judging calls into play the same skills and talents that one would hope that district judges possess, with the added advantage that there is perhaps more time for reflection not only as to the outcome of the particular cases and problems, but also as to precisely how answers are phrased, with the recognition that loose language can create problems for the system and for society down the road.

Senator HEFLIN. How does a responsible judge perform the process of interpreting such seemingly open-ended constitutional provisions as the due process or equal protection clauses?

Mr. **Selya**. Well, I think fundamentally that there has to be a recognition that what process is "due" varies depending upon the particular circumstances that are at issue. I think further that the clauses are not so open-ended as might appear because the answers to most legal problems, I find if one digs deeply enough and looks for them with sufficient intensity, are to be found in precedent.

I think finally that if we do not divorce ourselves from reality, from an appreciation of the practical consequences to the individual, the Government and to society, of what may be expected, that we will not go far astray.

Senator **Heflin**. Thank you. I might say that Senator Simon may have questions. He is coming, I understand, and he may have questions for the two of you, Judge Ginsburg and——

Mr. **Selya**. I will be happy to hold myself available to the committee.

Senator **Heflin**. Good luck to you thus far and hopefully everything will be expedited.

Mr. **Selya**. Thank you very much, Senator.

Senator Heflin Judge Duggan is next.

TESTIMONY OF PATRICK J. DUGGAN, OF MICHIGAN, TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MICHIGAN

Mr. **Duggan**. Thank you, Senator.

Senator **Heflin**. You have served as a judge on the Wayne County, Michigan Circuit Court since 1977. This, I believe, is a court of general jurisdiction. I am confident that you are very knowledgeable of State law, but I wondered, if you see any difficulty in the transition from the State court to the Federal District Court.

Mr. **Duggan**. I do not see any difficulty in the transition. I recognize that there are some significant differences in the Federal laws and the Federal procedure. I have had the opportunity this past week to attend the Federal Judicial Institute. There are some interesting differences and I think I have an obligation, which I intend to fulfill, to be aware of the differences, but I look upon it not as a difiiculty but as a challenge and an opportunity to do something different than I have been working on.

Senator **Heflin**. Do you feel that a district court judge should assume direct control over complex issues and cases in order to avoid the delays that often effectively manage such cases?

Mr. **Duggan**. I most certainly do. During the 10 years I have served on the circuit court, I have had many complex cases and I find that many times the attorneys who are very busy sometimes do not move as expeditiously as they should, and I have found that by taking charge, letting the attorneys know that there is a set timetable, that we are not going to tolerate the case being delayed, that if clear direction is given to the attorneys, that the case moves along expeditiously and the delay that would otherwise be encountered is avoided.

Senator **Heflin**. What are the standards that you would use in deciding that your court had a continuing administrative responsibility to oversee the implementation of one of its orders?

Mr. **Duggan**. Well, fortunately in the 10 years that I have served as a circuit court judge I have never had to enforce an order by way of contempt. I believe it is the judge's responsibility to make the order clear and to let the attorneys and the parties know exactly what is intended by the order. If they have any difficulty complying with the order, they have an opportunity to come back to the court and to advise the court of those difficulties. But if it is made clear to them what the order means, it is my intent that that order be fulfilled. I have found in the past that I have never had one yet that was not fulfilled and I would hope that I would be as successful on the Federal bench, if I am confirmed, as I have been on the circuit court.

Senator **Heflin**. I failed, in the beginning, to give you the opportunity to introduce any members of your family or close friends present. We would like for you to do so now, if you would like.

Mr. **Duggan**. Thank you very much. I have with me my wife and my five sons, and I would like to first introduce my wife Joan, my oldest son, Michael, my next older son who helped run the camera, Daniel, his brother James who is also running the camera, Robert and my youngest son, Timothy.

Thank you very much for that opportunity

Senator **Heflin**. I hope the camera recording will be memorable and faceable. [Laughter.]

Mr. **Duggan**. Thank you.

Senator **Heflin**. Thank you, Judge.

Mr. Alex Howard.

TESTIMONY OF ALEX T. HOWARD, JR., OF ALABAMA, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF ALABAMA

Mr. **Howard**. Thank you.

Senator **Heflin**. Mr. Howard, you have been a practicing attorney since 1950 and, in reviewing your file, I note that your litigation experience has been primarily civil in nature. Do you think your relative lack of criminal trial experience will in any way hinder you in the performance of your duties as a district court judge?

Mr. **Howard**. Senator Heflin, I have found that the trial of any issue, whatever the subject, is similar, I am not trying to say that my lack of criminal law experience will not be something I will have to put some work into, but I have learned new fields of law before and I have found that if you work at it and study hard at it that you can become conversant with any phase of the law, and I would hope that I would do that with criminal law.

Senator **Heflin**. Mr. Howard, your court appearances have been equally divided between Federal and State courts of record. Do you feel litigants in State courts receive the same level of fairness, due process, and equality of justice as do litigants in Federal courts, and would you explain your answer?

Mr. **Howard**. Well, Senator Heflin, at the expense of possibly alienating some of my friends on the State bench, I find the quality in our Federal courts in Alabama has been superior and that, by and large, the State court judges have been very good. We have missed having you on our State supreme court and I will not comment on what has happened to the court since you left, but we have I think in Alabama a lot of good Federal judges and a lot of good State judges and I am really not qualified to compare the two.

Senator HEFLIN. All right, sir. I did not prepare that question, I was merely paraphrasing. [Laughter.]

Mr. Howard, Article III, section 1 of the Constitution invests in the Congress plenary power to ordain and establish such inferior Federal courts as it sees fit. As a function of that direct power, is Congress equally empowered to limit the jurisdiction of lower Federal courts over various classes of cases and controversies?

Mr. HOWARD. Senator Heflin, that is an extremely complicated question and I would not want to be flippant with the committee, but it seems to me that under the Constitution since the legislative branch of our Federal Government established those inferior courts, perhaps they could abolish them altogether.

Senator HEFLIN. Well, in other words you say you want to study that a little further?

Mr. HOWARD. Yes, sir.

Senator HEFLIN. All right. I do, too. [Laughter.]

Mr. Howard, we would like very much for you to introduce your family and any other friends that you might have with you.

Mr. HOWARD. Thank you, Senator. I introduce my wife Anne, my son Sandy and his wife Terri, my daughter Catherine and her husband Dudley Dawson. I have two friends here, Mrs. William Joyce, from Washington, DC, and her son, Tiger Joyce.

Senator HEFLIN. Thank you.

Senator Simon.

Senator SIMON. Mr. Howard, first, you are well qualified. Your rating by the bar association is not too common up here and speaks verv highly of you. I might add that the Code of Judicial Ethics says it is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin, and I am pleased to have a copy of your resignation from the Athelstan Club, in Mobile, AL. I would like to enter that in the record, Mr. Chairman.

[The letter referred to follows:]

JOHNSTONE, ADAMS, HOWARD, BAILEY AND GORDON
ATTORNEYS AT LAW
104 ST. FRANCIS STREET, 8TH FLOOR
POST OFFICE BOX 1988
MOBILE, ALABAMA 36633

C. A. L. JOHNSTONE, JR.
R. F. ADAMS
ALEX T. HOWARD, JR.
CHARLES B. BAILEY, JR.
BROCK B. GORDON
BEN H. HARRIS, JR.
WILLIAM H. HARDIE, JR.
E. WATSON SMITH
JOSEPH M. ALLEN, JR.
I. DAVID CHERNIAK
DAVID C. HANNAN
RICHARD T. DORMAN
WADE B. PERRY, JR.
THOMAS S. RUE
CHARLES R. MIXON, JR.
ALAN C. CHRISTIAN
JAMES H. FROST
CELIA J. COLLINS
GREGORY C. BUFFALOW
ROBIN BRIGHAM THETFORD
E. W. MICHAEL CHAMBERS
RICHARD P. PETERMANN, JR.
R. GREGORY WATTS
JOHN A. CAREY
M. MARGARET O'BRIEN
W. ALEXANDER GRAY, JR.
PETER S. MACKEY
C. GRANTHAM BALDWIN
MICHAEL C. WHITE

TELEX NO. 78 2040

TELECOPIER
205/432-7088

TELEPHONE 432-7682
AREA CODE 205

OF COUNSEL
JAMES L. MAY, JR.

October 1, 1986

HAND DELIVERY

Athelstan Club
170 St. Francis Street
Mobile, Alabama 36602

Re: Resignation of Alex T. Howard, Jr.

Gentlemen:

I hereby resign as a member of the Athelstan Club effective immediately.

Please advise my rights with respect to my membership bond.

Yours very truly,

Alex T. Howard Jr

Alex T. Howard, Jr.

ATHjr:cbm

Senator SIMON. As I go through your background, I see that you have regular civil experience but your experience is very thin on the criminal side. We have had nominees come before us who have been thin on one side or another who have volunteered to go somewhere outside of their circuit just to get a little more of a feel for those areas in which they lack hands-on experience. I know you are going to go to the judges training course and all of that, but do you have any reflections on how you are going to bolster this side of your background that is not as strong as it might be?

Mr. HOWARD. One is that our chief judge in the Southern District of Alabama has recommended that I become fluent—he used the word fluent—with the Federal Rules of Criminal Procedure and has suggested that if I really study those rules and ask for help from the criminal bar at the outset, that I can, he believes, quickly pick up the criminal aspects of the court's duties.

I think this may be influenced by the fact that this particular judge did not have any criminal experience when he went on the bench either, though, and I really think your suggestion that I get help in that field is a good one.

Senator SIMON. I did not pass it along as any kind of mandate from the committee, but two of those judges who have volunteered to sit in on a few criminal trials have written to me saying it turned out to be a very helpful, valuable experience and I pass that along.

Mr. HOWARD. I appreciate it and I plan to do that, too, Senator.

Senator SIMON. I have no further questions, Mr. Chairman.

The CHAIRMAN. Thank you very much, Mr. Howard, and I hope you have a successful tenure on the bench.

Mr. HOWARD. Thank you, Mr. Chairman.

The CHAIRMAN. We will take Mr. Spencer next.

TESTIMONY OF JAMES R. SPENCER, OF VIRGINIA, TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA

Mr. SPENCER. Thank you.

The CHAIRMAN. Mr. Spencer, it has been brought out that you were born in South Carolina. I believe you went to school at Clark College in Atlanta, Harvard Law School and Howard University and parttime to divinity school. Did you complete your divinity work, too?

Mr. SPENCER. No, sir.

The CHAIRMAN. You decided to study law?

Mr. SPENCER. Yes, sir.

The CHAIRMAN. You figured you could serve the Lord just as well as a lawyer as being a preacher?

Mr. SPENCER. Yes, sir.

The CHAIRMAN. You were in the Army for 3 years, in the Judge Advocate General Corps. You served as assistant U.S. attorney, I believe, for 4 years.

Mr. SPENCER. That is correct, Your Honor.

The CHAIRMAN. Now, your litigation experience during this time has been primarily I guess in criminal work, has it not?

Mr. SPENCER. That is correct, Mr. Chairman.

The CHAIRMAN. Now, would you tell the committee what steps you would take to prepare yourself for the demanding civil caseload that awaits you as a Federal district court judge?

Mr. SPENCER. Well, first of all, Mr. Chairman, I have some experience in the civil area. In the first year and a half of my practice, it was totally civil and I tried some civil cases. In the last 7 or 8 months I have taken some civil cases into my caseload. In fact, I have tried several civil cases to judgment. I have one civil case pending on the 17th of October of this year.

Additionally, I have made it my business to sit in in other courtrooms and watch other judges preside over civil cases. I would also state to this committee that on the criminal side I have tried in excess of a hundred cases to judgment and I feel that the skills acquired in that endeavor would bode me well for learning the civil side in the area. I believe that with a lot of hard work and devoted study I can get myself ready to handle that area of my responsibilities.

The CHAIRMAN. Mr. Spencer, in reviewing your file I noted that as an assistant U.S. attorney you were responsible for conducting numerous investigations involving the distribution of illegal narcotics. I am confident that as a result of this activity that you have gained considerable insight into the drug problem facing our society. Would you give the committee your views on what actions should be taken to combat illegal drug trafficking in the United States?

Mr. SPENCER. Mr. Chairman, first of all, I would suggest that we turn up the heat in terms of preventing illegal narcotics from entering our borders. Additionally, I would suggest that we continue to emphasize the President's Organized Crime and Drug Enforcement Task Force. That particular approach involves utilizing continuing criminal enterprise indictments to get at large-scale drug traffickers.

Additionally, I would suggest that we would pursue and pursue vigorously those businessmen, lawyers, and others who help drug dealers to launder their very huge narcotics profits.

The CHAIRMAN. Mr. Spencer, how would you resolve a conflict between your own conscience or your own sense of justice and the clear meaning of a statutory or constitutional provision?

Mr. SPENCER. Your Honor—Mr. Chairman, a constitutional provision and a statute clear in its meaning always takes precedence over an individual judge's personal point of view. I think a judge should consistently avoid the temptation to set himself up as a one-man legislature. It is important that we keep the delicate balance between the branches of government and I believe that refraining from creating policy based on personal philosophy of views is a step in that direction.

The CHAIRMAN. Thank you very much. I hope you have a successful tenure on the bench.

Mr. SPENCER. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. First of all, I regret that I was not able to personally greet your lieutenant governor. I am a former lieutenant governor in Illinois. Please extend to him my greetings. And let me add that we are in a situation where, to take your nomination as well as the others, we are going to have to waive certain rules that we agreed to. Your Senator, Senator Warner, has been lobbying hard in your behalf and I think you should know that.

If I may follow through on the question that was asked by Senator Thurmond—it is really a reversal of the question I just asked the distinguished nominee from Alabama. Do you feel that you have enough background in the civil field that you can move into the Federal court and handle that aspect of your job without additional study or experience?

Mr. SPENCER. Senator, I would anticipate additional preparation before I handle a civil case. It has been suggested to me by the other members of the bench in that district that I come and sit with them in their courtrooms as they carry on and preside over a civil case. It has been suggested to me on a number of occasions and I intend to do that.

As I said, I have already begun the process of sitting in court while complex civil litigation goes on and I believe in the practice of law, whether it is criminal or civil, one must have the quickness of intellect to get a grip on many, many areas, and I have been successful at that before and I see no reason why I cannot become successful at presiding over civil trials.

Senator SIMON. I thank you. We are pleased to have your family here and that young man may be up here some day as a nominee for judge himself. Senator Thurmond will probably still be chairman of the Judiciary Committee. [Laughter.]

Mr. SPENCER. Senator, I have high hopes for him as well.

Senator SIMON. When you say "him," do you mean Senator Thurmond or your son? [Laughter.]

I thank you very, very much. Congratulations to you.

The CHAIRMAN. Thank you very much.

Mr. Joseph F. Anderson, Jr., come around please.

TESTIMONY OF JOSEPH F. ANDERSON, JR., OF SOUTH CAROLINA, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF SOUTH CAROLINA

Mr. ANDERSON. Thank you.

The CHAIRMAN. Joe, would you introduce your family?

Mr. ANDERSON. Yes, sir, Senator. I have my wife, Susan, her mother, Mrs. Diana Herlong, and Susan's sister, Harriet Parker, and her husband, Jim Parker, both of whom live and reside here in the D.C. area.

The CHAIRMAN. We are very pleased to have all of you here.

I am very pleased today to recommend Mr. Joseph F. Anderson, Jr. for confirmation as United States District Judge for the District of South Carolina.

Mr. Anderson was born in Augusta, GA. In 1972 he graduated from Clemson University with a bachelor of arts degree, and received the Norris Medal for being the best all-around student in his graduating class. He also won the Hughes Award for being the top reserve officers training corps graduate in the entire United States. That was the Army.

He received the Algernon Sidney Sullivan Award, which is given for outstanding service to Clemson University. Mr. Anderson then entered the University of South Carolina School of Law and in 1975 received his juris doctorate degree. He graduated No. 1 in his law school class and received both the Claud Sapp Award and the Cy Young Award. These awards for outstanding graduates are awarded by the students and faculty, respectively.

From 1975 to 1976, Mr. Anderson served as a law clerk to Judge Clement F. Haynesworth, Jr., of the U.S. Court of Appeals for the Fourth Circuit. He has been in private practice of law since 1976 in Edgefield, SC. His practice, which has included civil trial litigation before both State and Federal courts, and several administrative agencies, has also included a significant amount of criminal litigation.

In 1978, he was honorably discharged from the U.S. Army Active Reserve. Since 1981, Mr. Anderson has distinguished himself as a member of the South Carolina House of Representatives.

Mr. Anderson is an outstanding lawyer. He has the ability and intellect and integrity and judicial temperament to serve with distinction as a Federal district court judge. He has always been a respected leader among his peers and discharges his responsibilities in an exemplary manner. Mr. Anderson is held in high esteem not only by legislators, judges, and lawyers but also by the people of his district which he represents.

Mr. Anderson's sound philosophy and keen sense of justice are reflected in his service to the people of South Carolina. He will be a decided asset to the Federal bench and I know he will render outstanding service to our Nation as a member of the esteemed District Court of South Carolina.

I was very pleased to recommend Mr. Anderson to President Reagan and I am deeply proud to present him to the Judiciary Committee today and I am very pleased to say that he has been strongly endorsed by Senator Hollings who came here in person and endorsed him and also by Congressman Tallon, both of whom are Democratic Members of Congress.

Now, the bell has rung, so for 5 minutes I guess we will have to go and we will take a recess at this time.

[Short recess.]

The CHAIRMAN. The committee will come to order. Senator Simon and I had to vote and we are now back and so we will proceed.

Mr. Anderson, you have been a practicing attorney since 1976, I believe.

Mr. ANDERSON. Yes, Mr. Chairman.

The CHAIRMAN. Since 1981, you have served as a member of the South Carolina House of Representatives. From 1975 to 1976 you were a law clerk to Judge Haynesworth, I believe.

Mr. ANDERSON. That is correct.

The CHAIRMAN. Now President Reagan has nominated you to be U.S. district judge for the district of South Carolina. Do you believe your previous experience will be beneficial to you as a Federal district court judge, and if so, how?

Mr. ANDERSON. Yes, Mr. Chairman, I do. The year I was able to clerk with Judge Haynesworth on the fourth circuit, I was able to see quite a number of Federal cases work through the Federal system and I was able to read many transcripts of trials to see what judges had done right and what they had done wrong. I sincerely believe that during that 1-year clerkship I had I was able to expose myself to a great number of cases of many more than an attorney would in 2 or 3 years of private practice perhaps.

My service in the State legislature I think has given me an appreciation for our legislative process. I have seen the political process of our country work from the inside and I think that will give me a greater appreciation for a judicial role in another branch of our Government.

In my practice, I was fortunate to be able to practice with my father and my brother and in that regard I was able to get some trial experience at an early age. I did not have to work my way up through the system as one might with a larger law firm, and I do feel my three experienccs in that regard have helped me have the proper perspective as a district judge.

The CHAIRMAN. I believe the Anderson family has the biggest law firm now in that city.

Mr. ANDERSON. Yes, sir, for a relatively small city, yes, sir.

The CHAIRMAN. In addition to that, you are about the only one I know who has come before us—some of them have been first honor graduates and some have had other honors and some have had experience in the service as lawyers, but you are about the only one I know that has been the top ROTC graduate in the whole Nation. I believe you were the top Army ROTC cadet in the whole Nation, were you not?

Mr. ANDERSON. That is correct, Senator.

The CHAIRMAN. That is quite an honor and it involves a great honor to our State.

Mr. ANDERSON. Thank you, sir.

The CHAIRMAN. Mr. Anderson, in his famous dissent in *Plessy* v. *Ferguson* in 1893, Justice Harlan referred to our Constitution as a "colorblind" constitution. Would you agree with this characterization, and what does it mean?

Mr. ANDERSON. Yes, Senator, I do agree with it. I think it is unfortunate that it took our country many years for Justice Harlan's minority opinion in that case to evolve itself into what is now the prevailing opinion, but I do think our Constitution is colorblind. I think it is one of the great hallmarks of this country and it is one of the things that I think makes our Constitution certainly the greatest written document in the free world, and it is something that I am proud to be a part of it if I am confirmed.

The CHAIRMAN. In other words, it really means equal opportunity for everybody?

Mr. ANDERSON. Yes, sir.

The CHAIRMAN. Regardless of race, creed, color, or anything of the kind, does it not?

Mr. ANDERSON. Yes, sir.

The CHAIRMAN. And you believe in that, do you not?

Mr. ANDERSON. I do; yes, sir.

The CHAIRMAN. Mr. Anderson, do you believe that changes in the law should be reserved to the legislature whose members can be altered by the voters if the elected officials fail to reflect the values of society? In other words, do you believe that the legislative body should make the laws and the judicial body interpret the laws, and each stay in their sphere of activity as provided in the Constitution?

Mr. ANDERSON. Yes, sir, I do. One of the Founding Fathers I think referred to the Federal judiciary as the least democratic branch, and as I indicated in an earlier question, I think my legislative experience would be helpful because I have seen our process work and I appreciate the fact that, generally speaking, the laws that the people want to have enacted eventually do become law and when a bad law gets on the books sooner or later it will be repealed. And I think that the democracy would suffer if we leave it to our courts to correct unwise or foolish legislation, and I think that our democratic system is built on trial and error and the legislative process, and I do not feel that the judicial branch should involve itself with determining whether a law is a good law or a bad law or wise law or a foolish law.

The CHAIRMAN. The distinguished and able Senator from Illinois.

Senator SIMON. Thank you, Mr. Chairman.

First of all, you have some people who really believe in you, including the chairman of this committee, and Senator Hollings and Congressman Tallon and Congressman Butler Derrick and Congressman Charlie Rose. They all have spoken very highly of you.

Mr. ANDERSON. Thank you, Senator.

Senator SIMON. Your background is exceptional. I did note that the bar association gave you a qualified rating and it says the minority found you not qualified. Do you have any idea why that may have occurred?

Mr. ANDERSON. Senator, I of course was not privy to the committee's deliberations, but it is my understanding that the American Bar Association likes to see a nominee have 12 years of experience past law school. I am in my 11th year. I just began my 11th year this past August and I certainly cannot go inside their minds and hearts, but I would assume that that played a part in the deliberations. I know of no other factor that could have entered into it.

Senator SIMON. Right. Then I note that, as a student at the University of South Carolina, you wrote an article about insurance.

Mr. ANDERSON. Yes.

Senator SIMON. This is the last time you are going to get a chance to give your views on insurance before the Judiciary Committee of the U.S. Congress before you take that oath of office. Any reflections on the insurance crisis that we have been going through?

Mr. ANDERSON. Senator, I have followed the debate both on the national level with the products liability legislation being considered here in the Congress and on the State level with medical malpractice and tort reform generally, and I think that, as is true in so many political discussions, the truth probably lies somewhere in the middle.

I think that our jury trial system is one of the great benchmarks of our judicial system, and I would hate to see it restricted in any great degree. I think that the insurance industry certainly is asserting its interests and pointing out some unfair situations in some cases that are hard to justify, but I do not want to advocate that we scrap our entire system and begin severely restricting the rights of litigants to seek redress in our courts. I am a firm partisan believer in our system of jury trials that we have come to know in this country.

Senator SIMON. I thank you, Mr. Anderson. And if I ever want to be recognized by the chairman of this committee again, I am going to have to vote for your nomination. [Laughter.]

Mr. ANDERSON. Thank you, Senator.

Senator SIMON. It is a pleasure to have you here before us.

Thank you, Mr. Chairman.

The CHAIRMAN. You understand how he got elected in Illinois. He is a wise man. [Laughter.]

Mr. ANDERSON. Thank you.

The CHAIRMAN. Mr. Anderson, thank you very much and I hope you have a successful tenure on the bench and I wish your family all good health and happiness in the future.

Mr. ANDERSON. Thank you very much.

The CHAIRMAN. And your sister-in-law, who used to work for me, Ms. Parker.

Now we will take the two U.S. Claims Court judges, Mr. John Napier, and Mr. Wiese will be next after him.

TESTIMONY OF JOHN NAPIER, OF SOUTH CAROLINA, TO BE A JUDGE OF THE U.S. CLAIMS COURT

Mr. NAPIER. Thank you.

The CHAIRMAN. It gives me very great pleasure to introduce to the committee Mr. John L. Napier, President Reagan's nominee to be a judge for the U.S. Claims Court. Mr. Napier was born in Bennettsville, SC, in 1947. He received his undergraduate degree from Davidson College in 1969. Mr. Napier then entered the University of South Carolina School of Law and in 1972 received his juris doctorate degree.

After graduation from law school, Mr. Napier worked in several capacities in the U.S. Senate. From 1972 and 1973 he served as my legislative assistant and as minority counsel for this committee's Administrative Practice and Procedure Subcommittee.

From 1973 to 1976, Mr. Napier served with distinction as minority counsel and professional staff member for the Senate Veterans' Affairs Committee. From 1976 to 1978, he was my chief legislative assistant and legal counsel, as well as minority counsel for the Antitrust and Monopoly Subcommittee.

In 1977, Mr. Napier served a special assignment as the chief Republican counsel to the U.S. Senate Special Committee on Official Conduct. This was the committee which wrote the Code of Ethics for the Senate and its employees.

In 1978, Mr. Napier entered into private practice of law with the firm of Goldberg, Cottingham and Easterling in Bennettsville, SC. In 1980, he was elected to the U.S. House of Representatives from the Sixth District of South Carolina. During his tenure in Congress, he served on the Agriculture Committee and the Veterans' Affairs Committee and was appointed as Assistant Regional Whip.

In 1983, Mr. Napier returned to private practice in South Carolina and is now a partner in the law firm of Napier and Jennings in Bennettsville, SC.

Mr. Napier has a Martindale-Hubbard rating of AV. During his 14 years as a lawyer, Mr. Napier has had the opportunity to use his legal skills as a legislative assistant, a private practitioner and as a legislator. I believe this experience will be most valuable to him in the position to which he has been nominated. He is a man of ability, integrity and independence.

Mr. Napier is a dedicated and trustworthy individual, whose commitment to the law is highly regarded and whose outstanding record speaks for itself. He has experience and the judicial temperament to become an outstanding jurist. It is with considerable pride that I recommended Mr. Napier to President Reagan for this very important position, and it is with an equal amount of pride that I present him to the committee today.

Mr. Napier, we have just a few questions here. Would you like to introduce your family, if any of them are here?

Mr. NAPIER. Mr. Chairman, my wife Pam and daughter Page are in South Carolina, but I do have with me my law partner, Doug Jennings.

The CHAIRMAN. We are very pleased to have you with us.

Mr. Napier, the President has nominated you to be a judge of the U.S. Claims Court. This is a court of limited jurisdiction, restricted to granting of money judgments in instances where such relief has been authorized by Congress or the Constitution. Would you tell the committee what will be the most rewarding aspect of serving on this distinguished court?

Mr. NAPIER. Thank you, Mr. Chairman, for the opportunity to be here.

Mr. Chairman, I think anytime one can render public service—as public service is probably the highest calling someone can have other than the ministry or the physical ministry of being a physician—and in dealing with people's problems and trying to balance those problems against the interests of Government, it will certainly be a rewarding experience.

Many people think that the Claims Court would only hear matters that would come from corporations, from defense contractors or from others who have large claims with the Government. In fact, there are tax claims that small litigants have; there are claims that soldiers and sailors have. There are many claims that people have, and I think trying to balance that interest with the interest of the Government be a very rewarding experience.

The CHAIRMAN. Mr. Napier, rule 77 of the Claims Court requires that assignment of cases be made at random by the clerk. Do you feel that a court rule is sufficient to avoid specialization within the court or that legislation similar to the Federal Court Improvement Act pertaining to the Court of Appeals for the Federal Circuit should be mandated for the Claims Court?

Mr. NAPIER. Mr. Chairman, I have spoken very briefly with some of the judges about the procedures in the Claims Court. I have not gone into detail with them on the procedures, however, they tell me that the random selection process is working very well and it avoids specialization. I think that as cases are assigned at random, that it is a workable process that the others have told me they find acceptable.

I would not want to give a final answer on that until I see it work myself, however, at that time I would be delighted to come back and give you an answer on that experience.

The CHAIRMAN. Mr. Napier, the jurisdiction of the Claims Court includes authority to issue pre-award injunctions in Government contract cases. Do you believe that sufficient standards exist to guide the Claims Court judges in the exercising of this authority?

Mr. NAPIER. Mr. Chairman, in 1982, the current organization of the Claims Court was enacted into law, as I understand it. There is precedent in the law for pre-1982 cases for the old Court of Claims. There is a building precedence in the case law through the Federal Circuit for post-1982 cases.

Additionally, the procurement law itself has been changed within the last several years, so we are in a period of time when we are indeed building precedent and building case law on such matters.

I have briefly talked with some members of the court about the need for guidance and they have told me that they feel that post-1982 claims court law and the pre-1982 court of claims law, the precedents provide a workable situation.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. Thank you. First of all, Mr. Chairman, I had the privilege of serving with the nominee in the House of Representatives and I congratulate him.

Mr. NAPIER. Thank you, sir.

Senator SIMON. I also want to enter into the record your letter of resignation from an organization about which you have a very appropriate statement.

> Assuming confirmation by the United States Senate, I will be undertaking judicial responsibilities in Washington, D.C., and as such feel that it is most appropriate that I limit my membership in any private organization that restricts membership on the basis of sex.

I think you have done the right thing by resigning from that organization.

[The letter referred to follows:]

NAPIER & JENNINGS
ATTORNEYS AT LAW
151 BROAD STREET
POST OFFICE DRAWER 995
BENNETTSVILLE, SOUTH CAROLINA 29512

JOHN L. NAPIER
DOUGLAS JENNINGS, JR.

AREA CODE 803
479-2865

September 29, 1986

Mr. Batson L. Hewitt, Jr.
Chairman
The Caroliniana Ball
P. O. Box 1221
Columbia, South Carolina 29211

Dear Batson:

This is to acknowledge receipt and thank you for your letter of September 5, 1986 wherein you advised that the Membership Committee has advised you of my non-attendance at the last two (2) Caroliniana Balls and that the By-Laws of the Ball provide that if a member in good standing misses three (3) consecutive Balls, he will be dropped from membership unless there are extenuating circumstances.

Since I have been unable to attend the last two (2) Balls, and it appears that I will be unable to attend the Ball in 1987, I would ask that you submit my resignation at the next meeting of the Board of Directors. Assuming confirmation by the United States Senate, I will be undertaking judicial responsibilities in Washington, D. C. and as such feel that it is most appropriate that I limit my membership in any private organization that restricts membership on the basis of sex.

With kindest regards and best wishes,

Yours very truly,

John Napier

John L. Napier

JLN:nfm

The Caroliniana Ball

MICHAEL WARNER BATTLE
HAMLIN BEATTIE, III
PORTER CLARKE BLACKMAN
JAMES WILLIS CANTEY, JR
WILLIAM MacALLISTER COXE
ENOCH FLOYD DuPREE, JR
BATSON LAWRENCE HEWITT, JR
AQUILLA RICHARD JOHNSTON, JR
PHILIP WHITAKER KINDER
HENRY DARGAN McMASTER
JOHN IRVIN SAALFIELD
ERNEST HOWARD STANLEY, JR
THOMAS CALVIN STEVENSON, III
HUGH LaBARBE WILLCOX, JR
THOMAS BRIGHT WILLIAMSON

ADDRESS:
POST OFFICE BOX 12221
COLUMBIA, SOUTH CAROLINA 29211

October 9, 1986

Mr. John Napier
Attorney at Law
151 Broad Street
P.O. Drawer 995
Bennettsville, SC 29512

Dear John:

I received your letter of September 29 and acknowledge with understanding your desire to resign from the Caroliniana Ball. You may be assured that we wish you the very best of luck in your new undertaking.

Sincerely,

Batson L. Hewitt, Jr.
Chairman 1987
Caroliniana Ball

BLH:tlc
cc: Board of Governors

Senator SIMON. Just one question. As I look at your background, I notice that you were involved in the *Phillips Petroleum* v. *Schan* case. Any reflections?

Mr. NAPIER. Well, Senator, I was retained to give them advice on the governmental strategies that they wished to employ while they were undergoing this takeover effort, and I would just say that that is not quite as turbulent an area of the law as it was about 1-year ago or 18-months ago, and our system seems to be a system that has worked its way through these turbulent times.

I was advising them on some matters which require a policy solution, a legislative solution. The legislature saw fit not to act at that time and we have survived, and so I would say the composite wisdom of the legislature certainly shows that our country can survive even though sometimes we are on the losing side of the legislative proposals.

Senator SIMON. I have no further questions, Mr. Chairman.

The CHAIRMAN. Thank you.

Congratulations again, Mr. Napier, upon your appointment and I hope you enjoy your work on the claims court. It is a very important court and we wish you all success in it.

Mr. NAPIER. Thank you, Senator. I am deeply grateful.

The CHAIRMAN. You are now excused.

Now, Judge Wiese, if you will come around.

TESTIMONY OF JOHN PAUL WIESE, OF VIRGINIA, TO BE A JUDGE OF THE U.S. CLAIMS COURT

Mr. WIESE. Thank you.

The CHAIRMAN. Judge Wiese, you are already a member of the Claims Court, I believe.

Mr. WIESE. That is correct.

The CHAIRMAN. You are up for reappointment. Judge Wiese, you have served as a judge of the U.S. Claims Court since 1982, I believe.

Mr. WIESE. That is correct.

The CHAIRMAN. You have been on there for 4 years. With this experience, what recommendations, if any, would you make to improve the functions of the Claims Court?

Mr. WIESE. Mr. Chairman, let me say at the start that I take great pride in saying that the claims court has been an enormously successful institution in terms of handling a very heavy caseload of what are generally regarded as fairly complex cases. If there would be one advancement in the machinery of the court that I would urge the committee to consider, it would be that we receive an increase in the law clerk staffing. Currently, as you know, Mr. Chairman, each of the court's 16 judges is assigned one law clerk and my view is that enormous efficiencies could be achieved were we to be assigned two law clerks. I think that would be an investment well spent.

The CHAIRMAN. Judge Wiese, I consider judicial temperament to be a prerequisite for a Federal judge. Would you give me your thoughts on this subject?

Mr. WIESE. Mr. Chairman, I wholeheartedly agree with that statement. I define the term "judicial temperament" to include, first of all, a love of the law; second, respect for the individual litigants that appear before you; and, last, but certainly not least, a large dosage of patience for—shall we say—the inefficiencies of human nature. I think if you meld those three in virtually any combination, you have defined judicial temperament.

The CHAIRMAN. Judge Wiese, the interlocutory jurisdiction of the Court of Appeals for the Federal Circuit does not permit review of Claims Court decisions on liability before the quantum of damages has been determined in a case. Do you believe that this has adversely affected the productivity of the Claims Court?

Mr. WIESE. No, absolutely not, Mr. Chairman. It has not been so in my experience and I do not think it has been so in the experience of any of the Claims Court's judges. Let me add this as further explanation: Under present law there are instances in which an interlocutory ruling on the part of a Claims Court judge could be certified for appeal to the Federal Circuit, those instances being cases which involve a controlling question of law with respect to which there may be a substantial difference of opinion as to the outcome, and where a ruling on that question could materially hasten termination of the litigation.

So the short answer to your question is we have not been handicapped by the general rule that requires finality of judgment before appeal.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. I have no questions, Mr. Chairman.

The CHAIRMAN. You are now excused. Would you introduce your family before you leave?

Mr. WIESE. I would like to very much, Senator. May I introduce my wife, Alice, who has borne with my shortcomings for 25 years. Seated next to her is my secretary Julia Kreider who has been with me for 13 years. Last is Marie-Anne Pissarre, a law clerk of several years ago. Our son Patrick is away at school at this time.

The CHAIRMAN. We are very pleased to have you all with us.

Now, I think we have finished with all the judges, except we have got some witnesses here who wish to testify.

Senator SIMON. Mr. Chairman, I was not here for the questioning of either Mr. Selya or Mr. Ginsburg. I have a question or two I would like to address to them if I could, quickly.

The CHAIRMAN. All right. Mr. Ginsburg, would you come around, please. I remind you that you are still under oath, Mr. Ginsburg.

Mr. GINSBURG. Yes, sir.

Senator SIMON. If I could, one of the criticisms of the DC Court of Appeals is frankly that it is getting too academic, that you do not have enough lawyers with trial experience. I notice that the Bar Association gave you a qualified for the Court of Appeals, which is better than some Court of Appeals nominees we have received up here, but not well qualified or exceptionally well qualified. That may be the reason for the Bar Association's reluctance to give you a higher ranking.

There is no question about your legal ability and your personal skills. Do you have any comment about this criticism of the court becoming too academic?

Mr. GINSBURG. Well, Senator, in looking at the very recent past, I would point out that the court lost a very distinguished former academic when Mr. Justice Scalia was confirmed by the Senate a few weeks ago. I do not mean to suggest that I could entirely fill his shoes, but I think the court is not going to be any more academic if I am confirmed than was the case in the last several years during his service.

But taking a longer view of the matter, I do think that there is an appropriate role for qualified academic lawyers joining an appellate court, particularly, where the issues are more abstract and do not involve direct resolution of the sorts of moment to moment questions that arise in a trial court.

At the same time, I think a court should be, and a court of 12, as the DC Circuit is, very well can be balanced adequately and reflective of a variety of different backgrounds if it has even one or two people from each relevant background, including trial lawyers, academics, people who have been judges before in other systems, people who have served in the executive branch. I think that sort of diversity is very important in the court and I would not want to see it become homogeneous.

Senator SIMON. I have no further questions of Mr. Ginsberg, Mr. Chairman. I would like to ask Judge Selya a question or two

The CHAIRMAN. All right, would you come around, Judge. I thank you very much, Judge Ginsburg.

Mr. GINSBURG. Thank you, sir.

Senator SIMON. Judge Selya, you have received the same rating, qualified. As a sitting judge I might expect that you would receive a little higher rating and I note that there has been some criticism as well. I have here the newspaper article from the Providence Journal which cites a brief filed by the Rhode Island Bar Association and the Rhode Island Trial Lawyers Association complaining about judicial temperament, and the article suggests that it is aimed primarily at Judge Boyle but also at you. This is the first time I have heard of such a brief in my 2 years on the committee. Do you have any reflections on this?

Mr. SELYA. Yes; I have some comments on it, Senator Simon. There is no question that in 1982, when thanks to the appointment of the President and the confirmation of this committee, I assumed office, we were in dreadful straits in our small district court in Rhode Island. We were one of the most heavily backlogged Federal district courts in the Nation. Thanks largely to the efforts of Chief Judge Boyle and of the judge that I replaced, Senior Judge Bettine—who has continued to work at an Herculean pace—we have in the course of the last 4 years reduced that backlog of the district court to the point where we are now statistically one of the exemplar districts in the Nation.

There is an old saying that you cannot make omelets without breaking eggs, and it has been necessary for all of us, myself included, from time to time to be firm, extremely firm, with members of the bar who have appeared before us. I do not think that firmness has in any case shown discourtesy or disrespect. I do not think it has been at the expense of fairness or at the expense of the quality of justice, but it has certainly—I would be less than candid if I did not admit that it has led to some resentment toward the court as an institution and that has spilled over to some extent on myself as an individual. I am aware of that.

Senator **Simon**. I thank you. I have no further questions.

The **Chairman**. Thank you. Now, we have just about 3 minutes left. We have finished all the judges but we have several witnesses and I am going to swear them in and let you give your testimony to the chief counsel and he can go ahead with the hearing.

Mr. Paul Friedman, if you will stand up, Mr. Lawrence Huebner, would you stand up, and Mr. Nathaniel Speights, and Mr. James R. Scott, will you stand up, and Mr. Raymond A. Jackson will you stand up, and raise your right hand and be sworn.

Will the testimony that you give in this hearing be the truth, the whole truth, and nothing but the truth, so help you God?

Witnesses. I do.

The **Chairman**. Now, if you will go ahead. I thank all of you for coming and we will try to expedite these judges as much as we can. And unless there is some objection raised by some member of the committee, we would like to have them confirmed tomorrow. I will do my best.

Mr. **Short**. Thank you, Mr. Chairman.

Mr. Friedman, Mr. Huebner, Mr. Speights, if you will come forward, please, and just have a seat. We will take all three of you at one time.

Mr. Friedman, if you will go forward. If you will limit your testimony, please, to 5 minutes. Your full statement will go in the record, but if you will limit your statement to 5 minutes, please.

TESTIMONY OF PAUL L. FRIEDMAN, PRESIDENT, THE DISTRICT OF COLUMBIA BAR

Mr. **Friedman**. Very well, I would be happy to do that.

My name is Paul L. Friedman. I am an attorney in the private practice of law in the District of Columbia. I am a former Assistant United States Attorney here in the District of Columbia, and a former law clerk to a judge of the U.S. Court of Appeals for the District of Columbia Circuit. I am currently President of the 45,000 member District of Columbia Bar, which is now the third largest State bar association in the country.

We are here not to oppose Douglas Ginsburg and not to speak about the merits of this particular nominee at all, but to make three points about the process that has led to his nomination and to our all being here today. These are points we have made with respect to prior nominees to the D.C. Circuit and which we expect to make about future nominees to the D.C. Circuit.

First, we suggest and request that action on Mr. Ginsburg's nomination should be delayed for a brief period of time in order to allow time for the lawyers, the bar associations, and the citizens of the District of Columbia to make their views known.

Second, and related to the first, in a jurisdiction which has no U.S. Senator to represent it in this body, it is particularly important that nominations not be rushed through so that the local bar has an opportunity to be heard.

Third—and this relates to a point that Senator Simon made a few moments ago—it is really time to take stock of the D.C. circuit today. It is now a court consisting of only one person who is a product of the local legal community and no one with significant trial experience. The bar is very concerned about the situation.

It was interesting what Senator Warner said, in introducing his nominee—and I think this is an accurate paraphrase—"I follow the practice of inviting the State bar associations to assist me in the recommendation of individual nominees to the President." No one requests the bar associations of the District of Columbia to speak. We have no U.S. Senator to speak for us, and that is why it is particularly important that things not be rushed through and that the local bars be heard.

This court now has one person who is a product of this 45,000-member legal community, and that is fundamentally wrong. The practice of going outside the local legal community has gone back through every President—and I have done a little bit of historical study which is in my prepared comments—and it goes back to Franklin Roosevelt. It was certainly true when President Carter was president. Perhaps it has been brought home most dramatically recently because President Reagan has had so many appointments to make.

I have made the point to my friends at the Justice Department and as recently as yesterday to Mr. Ginsburg that it is because of the number of vacancies that the concern is so strong today and it does not relate to the quality of any particular nominee.

Mr. Short. Let me interrupt you now just for clarification. You have no opposition then to Mr. Ginsburg's record as a lawyer or professor of law or law enforcement officer for the Department of Justice; is that correct?

Mr. Friedman. I have nothing negative to say about Mr. Ginsburg. What I have to say is that if there were more time, the seven bar associations who have authorized me to speak for them today would do the kind of review that they normally do, their committees, their boards would review the qualifications of this nominee. I have no particular reason to believe that they would come up with anything negative about Mr. Ginsburg other than his lack of local ties.

Mr. Short. I understand. Thank you.

Mr. Friedman. And let me just say that those organizations—represent 45,000 lawyers, among my members are people who also belong to one or more of the other organizations, two of whose presidents are with me, and that includes the Bar Association of the District of Columbia, whose president has authorized me to make this point on his behelf and his organization's behalf, the Women's Bar Association, the Washington Council of Lawyers, the Hispanic Bar Association, and the D.C. Chapter of the Federal Bar Association, along with the superior court trial lawyers who are represented here today, and the Washington Bar Association which is represented here today.

Let me say that by my count there have been about half a dozen local practitioners appointed to the D.C. circuit in 50 years, and there is something wrong with that system. No President, so far as history shows, has been sensitive to this problem and they ought to be.

In our view, this is a national court, but this is a national bar. There are no people better in this country to deal with the administrative cases, to deal with the constitutional cases than the people that are members of our bar. That is why many of them have come to the District of Columbia to practice law.

In addition, I would say that the members of our bar are as diverse a group as one could find. They include Republicans and Democrats, conservatives and liberals, men and women, blacks, Hispanics, and whites, young lawyers, older lawyers, trial lawyers, law professors, experts in administrative law, and experts in constitutional law.

I have mentioned the national law practice, and I see that my time is about up, if I could take about 30 seconds.

Mr. SHORT. If you would wrap up, please.

Mr. FRIEDMAN. There is also a local trial bar here that, as Senator Simon suggested, needs to be represented on this court. To be a truly great appellate court, it needs balance. It needs some people with trial experience. We ought to elevate some people from our distinguished superior court. We ought to elevate some people from our distinguished local court of appeals. We ought to elevate some people from our U.S. district court. And the problem as we see it is that because we do not have representation in this body and because it is an easy place for Presidents of both parties to place people, admittedly people of competence and ability, from other parts of the country, our bar, our very distinguished bar has been ignored.

We think this committee ought to be sensitive to that, this and future administrations ought to be sensitive to that, and we also think that, given the process that has been followed, there ought to be time for the local bars to be heard.

Thank you very much.

[The prepared statement of Mr. Friedman follows:]

STATEMENT OF PAUL L. FRIEDMAN
PRESIDENT
THE DISTRICT OF COLUMBIA BAR
ON THE NOMINATION OF
DOUGLAS GINSBURG
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mr. Chairman:

My name is Paul L. Friedman. I am an attorney in the private practice of law in the District of Columbia, a former Assistant United States Attorney here and a former law clerk to a Judge of the United States Court of Appeals for the District of Columbia Circuit. I am currently the President of The District of Columbia Bar which, with its nearly 45,000 members, is now the third largest state bar association in the country. I appear before the Committee on behalf of the Bar of the District of Columbia with respect to the nomination of Douglas Ginsburg to the United States Court of Appeals for the District of Columbia Circuit.

Let me say at the outset that, from our perspective, this is not a political issue. The position we take today is one the Bar has espoused for many years and relates only indirectly to Mr. Ginsburg and not at all to his abilities or intellect. In fact, I am not here to speak about the merits of this particular nominee. Instead I wish to make three points about the process used in the selection and consideration of Mr. Ginsburg and other candidates to the U.S. Court of Appeals for the D.C. Circuit and to the kind of a court that process has produced:

First, action on the nomination of Mr. Ginsburg should be delayed to allow adequate time for the lawyers, the bar associations and the citizens of the District of Columbia to make their views known.

Second, in a jurisdiction which has no United States Senator to represent it in this body, it is particularly important that nominations to our federal courts not be rushed through, so that the local bar has an opportunity to be heard.

Third, it is time to take stock of the D.C. Circuit today: It is now a court consisting of only one person who is a product of the local legal community and no one with significant trial experience. The Bar is very concerned about the situation.

A year ago, one of my predecessors as President of the Bar, Marna Tucker, testified before this Committee on the nomination of James Buckley to the D.C. Circuit. Last spring another of my predecessors, Frederick Abramson, wrote to the Committee concerning the nomination of Stephen Williams. Ms. Tucker and Mr. Abramson made clear, as I have tried to make clear today, that the Bar is concerned about the process involved in the appointment of judges to our federal courts and is not expressing a view on the merits of any particular nominee. Ms. Tucker and Mr. Abramson expressed concern on behalf of the Bar (1) that the ABA Federal Judiciary Committee had not consulted with local lawyers and judges on the Buckley and Williams nominations, and (2) that not enough time had been provided to permit the expression of views by the local Bench and Bar.

The Bar continues to be concerned about the process. While this time the ABA Committee, in the short time allotted to it since Mr. Ginsburg was nominated a little over a week ago, appears to have consulted with lawyers and judges in the District of Columbia, it has had to act with undue haste. But there has been no time for the local bar associations to react through their appropriate committees and boards. The Presidents of the Bar Association of the District of Columbia and the Women's Bar Association have authorized me to advise the Committee that they would have a position to convey to the Committee on Mr. Ginsburg's nomination if only they were given adequate time. I understand that the President of the Washington Bar Association has already submitted a statement to this Committee.

The disturbing fact is that there is a long practice that has been followed by every President at least since Franklin Roosevelt to look outside the Bar of this city when seeking candidates for appointment to the United States Court of Appeals for the District of Columbia Circuit. Every Administration has to a large extent ignored the talent, experience, diversity and knowledge of the now nearly 45,000 members of our Bar and opted instead for lawyers from other parts of the country.

These individuals, while in many cases extremely talented and able, nevertheless have been brought to Washington from elsewhere. They have been nominated to the D.C. Circuit where they affect the lives and destinies of the citizens of the one jurisdiction that has no elected representative to participate in the advice and consent processes of the United States Senate.

Retired, defeated or incumbent Congressmen from around the country have long constituted one pool of candidates. President Roosevelt appointed Congressman Fred Vinson of Kentucky, and President Truman nominated Senator Bennett Champ Clark of Missouri. President Eisenhower named Senator John Danaher of Connecticut, and President Nixon appointed former Congressman George MacKinnon of Minnesota. President Carter nominated Congressman Abner Mikva of Illinois, and President Reagan appointed former Senator James Buckley of New York.

The world of academia has been perhaps the most popular source of talent, at least in recent years, but only one President has seen fit to turn to a local law school for judicial nominees. President Roosevelt selected Professor Henry Edgerton of Cornell and Wiley Rutledge, Dean of the Iowa Law School. President Truman nominated George Thomas Washington, another Cornell professor, and President Kennedy named Carl McGowan, Counsel to the Governor of Illinois and former Northwestern University law professor. President Johnson appointed Spottswood Robinson, who at the time of his appointment to the District Court was Dean of the Howard University Law School. President Carter appointed Harry Edwards from the University of Michigan and Ruth Bader

Ginsburg from Columbia. President Reagan has appointed three law professors (four, if we include Mr. Ginsburg): Robert Bork from Yale Law School, Antonin Scalia from the University of Chicago, and Stephen Williams from the University of Colorado.

There are lawyers from other parts of the country brought to Washington to serve briefly in the Justice Department and then appointed to the D.C. Circuit. Over the years there were Assistant Attorney General Thurman Arnold of Connecticut, Assistant Attorney General David Bazelon of Illinois, Assistant Attorney General Warren Burger of Minnesota, and former Assistant Attorney General Malcolm Wilkey of Texas. Now President Reagan has nominated Assistant Attorney General Ginsburg.

Finally, President Kennedy selected a United States District Court Judge from another part of the country for the D.C. Circuit, J. Skelly Wright, at the time a sitting federal judge in Louisiana. And President Reagan apparently is about to nominate David Sentelle, currently a U.S. District Court Judge in Asheville, North Carolina, to our Circuit.

Where are the local practitioners in all of this? There have been a few to be sure, but not many. Yet they have been among the stalwarts of the Court: E. Barrett Prettyman, Judge James Proctor, Judge Walter Bastian, Harold Leventhal, Roger Robb and Patricia Wald. But half a dozen local practitioners in half a century is not a record of which to be proud. It is a record about which our Bar has grown increasingly concerned.

So far as history shows, no President has thought it important even to consider the local ties of any of his nominees to the federal appellate court here. Knowledge of the District of Columbia and its laws and commitment to the District and its people all seem to have been irrelevant. Many recent appointees to the Court have never even been admitted to practice law here, and Mr. Ginsburg is no exception. Rather, with no Senatorial courtesy (indeed, no

Senator at all) to play a role, Presidents and Attorneys General for half a century have appointed whomever they chose from wherever they happened to hail to the D.C. Circuit.

President Reagan has even appointed three individuals to our Circuit whose home state Senators apparently had rejected them for appointment to the Circuits from which they came. I understand that is why Judges Starr, Buckley and Williams are members of the D.C. Circuit instead of the Fourth, Second and Tenth Circuits, respectively. And presumably it is because of his home state Senators that Judge David Sentelle of the U.S. District Court for the Western District of North Carolina is about to be nominated to the D.C. Circuit instead of to the Fourth Circuit.

We in the District of Columbia have no home state Senator to either block or champion a particular judicial nominee. We do, however, have a distinguished and increasingly frustrated Bar that is tired of being ignored when it comes to appointments to our own Circuit. I suggest that it is time for this Administration and those that follow to look first and foremost to members of our Bar for nominees to the D.C. Circuit. I urge this Committee to join us in sending that message.

The D.C. Bar now has a membership of nearly 45,000 lawyers -- 45,000 individuals licensed to practice in the District of Columbia. These lawyers are as diverse a group as one can find. They include Republicans and Democrats, conservatives and liberals, men and women, Blacks, whites and Hispanics, younger and older lawyers, trial lawyers and law professors, experts in administrative law and experts in constitutional law, lawyers with local practices and lawyers with national practices.

This last point is important because some have suggested that the appointment of non-D.C. lawyers can be justified because the D.C. Circuit is truly a national Court. An analysis of the Court's cases may or may not support that premise. In any event, the reality is that since at least the mid-1960's our Bar has been a truly national Bar that includes a large number of lawyers with practices that reach across the country in terms of geography, scope, subject matter and impact. Indeed, many of these lawyers decided to practice law in the Nation's capital precisely because of the national practice that has developed here. They are the lawyers best versed in some of the so-called national issues that confront the D.C. Circuit.

The District of Columbia Circuit does not just deal with administrative agency cases. It considers a large number of appeals from the federal district court, including appeals from civil and criminal cases which have been resolved on motion or after trial. It therefore is significant that the District of Columbia Bar has within it a great trial bar: men and women who understand not only legal theory but the practice of law, the rules of evidence, and civil and criminal procedure. To be truly great, an appellate court needs balance, including some individuals with extensive practical trial experience. So why not elevate a judge from our local or federal trial bench or appoint one of the great trial lawyers of our community?

Mr. Ginsburg's nomination was only officially announced on September 23, 1986, and it was as recent as September 27 that the press reported that a federal district judge from another jurisdiction is likely to be appointed to the next vacancy. In the week since these developments have become public, I have received numerous calls from the presidents of many of the voluntary bar associations in our city, from trial lawyers and from trial judges asking what the Bar can do, asking whether we can stop the trend that has gone on far too long, a trend that has produced a court with no significant trial experience and few ties to the local legal community or to the broader citizen community of the District of Columbia.

Right here in the District of Columbia are the talent, the diversity and the experience necessary to enable any Administration to select those who meet its particular tests for appointment and at the same time to assure that the U.S. Court of Appeals for the D.C. Circuit, the second most important court in the country, continues to be inhabited by the best and the brightest. This is an issue of importance to the Bar, this city and, ultimately, to the credibility of the Court.

On behalf of The District of Columbia Bar, I ask the Committee to delay action on Mr. Ginsburg's nomination to allow the local legal community to be heard. I also ask the Committee and the Administration to consider all future nominations to the federal courts in our unrepresented jurisdiction in a more deliberate manner to allow more input from the District of Columbia Bench and Bar. Most importantly, I urge the Committee and the Administration to consider carefully the makeup of the United States Court of Appeals for the District of Columbia Circuit today and how essential it is that those from the local legal community and those with significant trial experience be among its members.

Thank you.

Mr. **Short**. Thank you, Mr. Friedman.

Mr. Huebner, president of the Superior Court Trial Lawyers Association.

TESTIMONY OF LAWRENCE H. HUEBNER, PRESIDENT, D.C. SUPERIOR COURT TRIAL LAWYERS ASSOCIATION

Mr. **Huebner**. Thank you. My name is Lawrence Huebner. I am an attorney in the private practice of law in the District of Columbia.

The membership of our association is composed of attorneys active in trial work, general trial practice in the District of Columbia. We have a particular emphasis on criminal defense work. The attorneys who are members of this association are probably counsel in excess of 20,000 cases per year in the District of Columbia.

I appear before the committee on behalf of the members of the District of Columbia Superior Court Trial Lawyers Association with respect to the nomination of Douglas Ginsburg.

We do not oppose Mr. Ginsburg on his own record. We certainly do not have any objection to him. But as has been spoken to by Mr. Friedman, we too have not had time to review his qualifications, nor have we been included in that process. That is at least partly the thrust of our appearance here today.

Mr. **Short**. Do you have any reason to believe that if you did have additional time, that you would have any reason to oppose at that point?

Mr. **Huebner**. No, sir. We will concede that we are minimally familiar with his qualifications. I certainly have heard nothing negative about him today.

Mr. **Short**. Thank you.

Mr. **Huebner**. I present five points for your consideration.

One, further action on the nomination of Mr. Ginsburg should be postponed until such time that the Washington, DC, legal community, including its lawyers, bench and voluntary bar associations, are given an ooportunity to be heard.

Two, a durable mechanism, or set of procedures, should be established to prevent the recurrence of this problem, whether it be by the administration or whether it would be by this committee. We would ask a greater sensitivity to it. Such procedures should include the opportunity for the lawyers, the bar associations, and the citizens of the District of Columbia to announce their positions or views regarding such nominations. The procedure should also include opportunity for the bar associations, either independently or in conjunction with the Committee on Judicial Tenure, to submit their own recommendations from the District of Columbia Bar.

Three, in a jurisdiction which has no U.S. Senator to represent it in this body, it is particularly important that nominations to our Federal courts not be rushed through, so that the local bar has an opportunity to be heard.

Four, it is time that the diversity and abilities of the members of the District of Columbia Bar be recognized as a national bar, fully capable of sustaining appointments to our own Federal courts.

Five, the question of the composition of the present D.C. circuit is of concern to the membership of our association.

The present selection process encourages appointments to the D.C. circuit of persons without actual knowledge of the laws of the District of Columbia. This problem is not new. Rather, it appears to be a long-standing tradition that each administration look elsewhere to find candidates to fill vacant positions on the U.S. Court of Appeals for the District of Columbia Circuit.

The overall history of the existing process denies or ignores the considerable pool of talented attorneys available from within the ranks of the District of Columbia Bar. The vast range of experience and diversity present among the nearly 45,000 members of our bar is second to none.

Appointment to the District of Columbia circuit we feel should at least include membership in the District of Columbia Bar and certainly a working knowledge of the local laws here. Appointments of individuals without such knowledge ignores basic premises of particular interest to our criminal defense bar.

When you join lack of knowledge of District of Columbia laws together with a lack of practical trial experience, you invite a lack of appreciation of the everyday problems confronted by private practitioners asserting their client's constitutional rights in criminal proceedings. Such candidacies invite a chilling effect simply due to a lack of appropriate experience.

This is again not intended to be a political statement nor an objection to Mr. Ginsburg's own qualifications. It does, however, cause concern that once again a nominee to the U.S. Court of Appeals is not even a member of the District of Columbia Bar. Historically, it does not appear that the various administrations have placed much, if any, importance upon the local ties of nominees. We would ask the committee to take that into consideration in the future.

As Paul Friedman has pointed out, the D.C. bar now has a membership of nearly 45,000 lawyers. This membership is at least as diverse as any other bar in the country. It includes Democrats and Republicans, conservatives, moderates, and liberals. It is a racially, religiously and ethnically mixed membership, with both trial and administrative lawyers, as well as constitutional experts.

Where else in this country can one find so many lawyers who are members of the local bar and are intimately familiar with administrative or regulatory practitioners. Many of our attorneys practice nationally. Many of them are defense, trial, juvenile or family attorneys.

The historical prestige of the United States Court of Appeals for the District of Columbia Circuit requires a true blend of all backgrounds, including not only former academics and prosecutors or public servants, but also private practitioners and defense attorneys. Such candidates can be found within the local legal community. This issue is of great importance not only to the bar but also to the citizens of this city.

On behalf of the District of Columbia Superior Court Trial Lawyers Association, I ask this committee to delay action on Mr. Ginsburg's nomination to allow the local legal community to be heard, and we join with the D.C. bar in this request.

Thank you.

[The prepared statement of Mr. Huebner follows:]

STATEMENT OF LAWRENCE H. HUEBNER
PRESIDENT
D.C. SUPERIOR COURT TRIAL LAWYERS ASSOCIATION
ON THE NOMINATION OF DOUGLAS GINSBURG
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mr. Chairman:

My name is Lawrence Huebner. I am an attorney in the private practice of law in the District of Columbia. I am currently the President of the District of Columbia Superior Court Trial Lawyers Association. The membership of the Association is composed of attorneys active in general trial practice in the District of Columbia with particular emphasis on criminal defense work. The attorneys who are members of this association are probably counsel in excess of twenty thousand cases per year in the District of Columbia. I appear before the Committee on behalf of the members of the District of Columbia Superior Court Trial Lawyers Association with respect to the nomination of Douglas Ginsburg to the United States Court of Appeals for the District of Columbia Circuit.

I present five points for your consideration:

(1) Further action on the nomination of Mr. Ginsburg should be postponed until such time that the Washington, D.C. legal community, including its lawyers, bench and voluntary bar associations, are given an opportunity to be heard. Further, the citizens of the District of Columbia and their representatives should also be afforded an opportunity to make their views known.

(2) A durable mechanism, or set of procedures, should be established to prevent the recurrence of this problem. Such procedures should include the opportunity for the lawyers, the bar associations and the citizens of the District of Columbia to announce their positions or views regarding such nominations. The procedures should also include opportunity for the bar associations, either independently or in conjunction with the Committee on

Judicial Tenure, to submit their own recommendations from the District of Columbia Bar.

(3) In a jurisdiction which has no United States Senator to represent it in this body, it is particularly important that nominations to our federal courts not be rushed through, so that the local bar has an opportunity to be heard.

(4) It is time that the diversity and abilities of the members of the District of Columbia Bar be recognized as a national bar, fully capable of sustaining appointments to our own federal courts.

(5) The question of the composition of the present D.C. Circuit is of concern to the membership of our association.

The present selection process encourages appointments to the D.C. Circuit of persons without actual knowledge of the laws of the District of Columbia.

The undue haste with which the ABA Federal Judiciary Committee has had to act has further precluded appropriate

* * * * * * *

This is not intended to be a political statement nor an objection to Mr. Ginsburg's own qualifications. Frankly, few of us in the District of Columbia are even minimally familiar with Mr. Ginsburg's background or qualifications. This situation clearly underlines some of the previously enunciated concerns contained herein. However, it does cause concern that once again a nominee to the United States Court of Appeals for the District of Columbia Circuit is not even a member of the District of Columbia Bar. Historically, it does not appear that the various Administrations have placed much, if any, importance upon the local ties of nominees.

As Paul Friedman, the President of the D.C. Bar has pointed out, the D.C. Bar now has a membership of nearly 45,000 lawyers. The membership of the District of Columbia Bar is at least as diverse as any other Bar in the country.

Politically it includes Democrats and Republicans, conservatives, moderates and liberals. It is a racially, religiously and ethnically mixed membership with trial and administrative lawyers, as well as Constitutional experts. Where else in this country can one find so many lawyers who are members of the Bar and are also administrative or regulatory practitioners. Many of these lawyers possess national practices. Many, of particular interest to our voluntary bar, are defense, trial, juvenile, family and appellate attorneys.

The historical prestige of the United States Court of Appeals for the District of Columbia Circuit requires a true blend of all backgrounds, including not only former academics and prosecutors or public servants but also private practitioners and defense attorneys. Such candidates can be found within the local legal community. This issue is of great importance to the Bar and the citizens of this city.

On behalf of the District of Columbia Superior Court Trial Lawyers Association, I ask this Committee to delay action on Mr. Ginsburg's nomination to allow the local legal community to be heard, and to provide meaningful procedures in the future to allow appropriate input into all future nominations to the federal courts in our unrepresented jurisdiction. I further ask that you seriously consider and weigh the importance of insuring that attorneys with significant trial experience be among the members of the United States Court of Appeals for the District of Columbia.

Thank you.

Mr. SHORT. Thank you.

Mr. Speights, President of the Washington Bar Association.

TESTIMONY OF NATHANIEL H. SPEIGHTS, PRESIDENT, THE WASHINGTON BAR ASSOCIATION

Mr. SPEIGHTS. Thank you. It is my pleasure to appear today on behalf of the Washington Bar Association. However, I do so with a great deal of sadness, as a person who moved to the District of Columbia in the last administration, I had the pleasure of serving the Government here and I found that I was disinfranchised in my move to the District of Columbia. I was disinfranchised because I was unable to utilize the power of my vote as a citizen of the United States and a taxpayer when it came to participation in our political process involving appointed positions.

The judicial branch of Government is already in my view—and many scholars agree with me—the least responsive branch of our Government to the citizenry. In the District of Columbia, we have many fine lawyers. The lawyers in my firm, as many firms on K Street, are called upon every day to represent people in diverse issues throughout the world, not just throughout the country. We are a national bar in the District of Columbia.

In the District of Columbia, we have more lawyers per capita than anywhere else in the world. That has often been unfortunate, but it does one thing, it sharpens one's skills as a lawyer, as competition always does. So I feel that if we in the District of Columbia, as lawyers, had the ability to champion the causes of captains of industry as well as practice locally, we have enough lawyers and judges here to have a good pool of nominees for Federal courts that sit within the District of Columbia.

The D.C. circuit is one of those courts. Our bar association committee on the judiciary was not even consulted on this nominee. And while it is abundantly clear that Mr. Ginsburg is minimally qualified based on his career and his teachings at Harvard, he certainly does not have the requisite experience that one would require, that our committee would have required of a judge for a particular court, and that is experience before the bench upon which you wish to assume authority over.

Therefore, we believe that the process in this case has been rushed. The citizens of the District of Columbia have not had an opportunity to view this candidate to make a fair and impartial decision and to make their voice known to this committee and to the U.S. Senate. We therefore join our voice in harmony with the unified bar and the other bar associations of the District of Columbia and ask that this nominee's consideration be delayed until such time as the bar can be heard on the matter.

Thank you.

[The prepared statement of Mr. Speights follows:]

STATEMENT OF NATHANIEL H. SPEIGHTS
PRESIDENT
THE WASHINGTON BAR ASSOCIATION
ON THE NOMINATION OF
DOUGLAS GINSBURG
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
BEFORE THE
JUDICIARY COMMITTEE
UNITED STATES SENATE
OCTOBER 1, 1986

Mr. Chairman:

My name is Nathaniel H. Speights. I am President of the Washington Bar Association. The Association is America's oldest and largest local voluntary bar founded by Black lawyers. We are an affiliate of the National Bar Association. As you are well aware, our Bar Association was founded because segregation prevented participation of Black lawyers in legal affairs affecting the Bench. Today, we raise our voice in harmony with the other voluntary bar associations and with the unified D.C. Bar to oppose a policy and procedure which prevents citizens of the District of Columbia from meaningful participation in the selection of Federal Judges.

We of course realize that citizens of the District of Columbia have no elected representative in the United States Senate. Thus we realize it is not possible to exercise the privilege of Senatorial courtesy with respect to the appointment of Federal Judges.

Our bar association believes that the practice of law within the District of Columbia requires the highest level of expertise. This is not simply because the federal government is here, though to be sure that is a significant factor, but also because Washington has become the most important city in the free world. Nearly all commerce, diplomacy and trade at some time requires a Washington contact. My firm, like many others on K Street, has a large base of clients from outside the jurisdiction as well as our local practice.

The value of a "Washington Lawyer" in the market place is obvious, nonetheless this large pool of lawyers with national/federal expertise has historically been disenfranchised by the Senate, the President and the Attorney General. The federal courts in the District of Columbia have become the Bench used to appoint those who are unable to pass political or judicial muster within their home state. We join the unified bar and the other voluntary associations in condemning this practice.

Finally, since our Association's Committee on the Judiciary was not consulted by the American Bar Association and since Mr. Ginsburg has no significant ties to this legal community, we have been unable to evaluate his fitness and character. We therefore urge this Committee to delay action on Mr. Ginsburg's nomination to allow the District of Columbia legal community an opportunity to be heard.

Thank you.

Mr. SHORT. Thank you very much, gentlemen. I am certain the chairman will review the record. He certainly will take your remarks under advisement and I know he appreciates your testimony here today.

Also, the chairman has a few points on the D.C. courts and, without objection, he will include it in the record at this point.

[The information supplied by Senator Thurmond follows:]

POINTS ON D.C. COURTS

- Because Congress has conferred special jurisdiction and venue on the D.C. courts and because the rulings of these courts involving Congress, the President, and federal agencies have a direct and immediate impact far beyond the boundaries of the District of Columbia, these courts are of much more than merely local importance.

- Various statutes provide for exclusive review in the District of Columbia Circuit of federal administrative agency actions involving the adjudication of individual rights. For example, the Communication Act Amendments of 1952 provide for exclusive review in the District of Columbia Circuit of FCC actions such as the denial of an application for a construction permit or a station license. Similarly, the International Claims Settlement Act of 1949, the Merchant Marine Act of 1936, the Energy Policy Conservation Act, the Clean Air Act, the Noise Control Act, the Federal Energy Administration Act, the Outer Continental Shelf Leasing Program, the Resource Conservation and Recovery Act, and the Safe Drinking Water Act, all provide for exclusive review of certain agency actions by the District of Columbia Circuit Court of Appeals.

- The jurisdiction of the United States District Court for the District of Columbia differs significantly from that of all other federal district courts. There are approximately 200 individual federal statutory grants of either exclusive or concurrent jurisdiction in the D.C. District Court, and obviously, appeals from the D.C. District Court lie in the D.C. Circuit.

- Additionally, the venue provisions in 28 U.S.C. §1391(e) open the D.C. District Court to suits by plaintiffs residing nationwide. As a result of these anomalies, the quantity and type of cases heard by the D.C. District Court, and thus also by the D.C. Circuit, differ substantially from those of other federal district courts, with a large proportion involving claims which pertain to individuals and geographic areas thousands of miles away.

- By virtue of their location in the District of Columbia, the D.C. courts occupy a unique position in the federal court structure. The D.C. courts are uniquely positioned to address claims from all corners of the nation which involve the government as a party, or the impact and operation of governmental programs. As a result, the D.C. courts routinely hear a plethora of cases which have little or no connection to the metropolitan Washington, D.C. area. Cases are brought here, rather, because of the District's status as a national capitol.

- A large number of D.C. court cases involve challenges to federal regulatory action or to federal programs which are implemented and predominantly affect persons, industries and geographic areas outside of the District of Columbia.

- Compared to states that are similar in size to D.C., D.C. is not "underrepresented" on federal appeals courts. Moreover, most of the D.C. Bar membership is resident and also licensed in Virginia and Maryland and so are "represented" on the Fourth Circuit.

PROFILE OF RECENTLY RETIRED AND SITTING JUDGES ON THE DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEALS

David Lionel Bazelon (1950-1979) - Until going to work as Assistant Attorney General in the Lands Division three years before his appointment as a judge on the D.C. Circuit, he spent his entire career in the state of Illinois.

Robert Bork - Was Solicitor General of the United States for four years, and practice briefly in D.C. just before his expected appointment to the D.C. Circuit. Other than that, his career was entirely in private practice and academics in Illinois and Connecticut.

James Buckley - only D.C. background was two years at the Department of State and six years as a United States Senator.

Harry T. Edwards - Was a Professor of Law and in private practice. He had no D.C. background at all, not even with the government.

Ruth Bader Ginsburg - Was a Professor of Law and in private practice in New York. She had no D.C. background at all, not even with the government.

Harold Leventhal (1965-1979) - Spent most of his career in D.C., including government positions and nineteen years private practice immediately before being appointed.

George MacKinnon (1969-1983) - Except for one year spent as Special Assistant to the Attorney General of the United States eight years before his appointment, he spent his entire career in Minnesota.

Carl McGowan (1963-1981) - He had no D.C. experience except for being with the U.S. Navy Department during WWII, the Office of War Mobilization & Reconversion from 1945 -1946, and an attorney with a D.C. firm from 1946 to 1948. He spent the rest of his career in Chicago.

Abner Mikva - Was a law clerk on the United States Supreme Court and a member of Congress from the state of Illinois. Otherwise, he had no D.C. background.

Roger Robb (1969-1982) - Spent his entire career in D.C.

Spotswood Robinson - Spent bulk of career in Richmond, Virginia, but was a member of the Civil Rights Commission from 1961 to 1964, and was appointed a United States District Judge for the District of Columbia in 1964.

Antonin Scalia (1982-1986) - Held various offices with the federal government from 1971 to 1977. Otherwise, no D.C. background. He had practiced in Ohio and taught in Illinois.

Laurence Silberman - Was in private practice in D.C. for approximately one year immediately preceding his appointment. At other times during his career, he was also in D.C., both in private practice and with the government, but he moved around quite a bit, and he was not mainly a D.C. lawyer.

James Skelly Wright (1962-1986) - Except for two years with a D.C. law firm from 1946 to 1948, he spent his entire career in Louisiana.

Kenneth Starr - Had a clerkship on the Supreme Court, was with a D.C. law firm for three years, and was Counselor to the Attorney General.

Patricia Wald - Spent her entire career in D.C., mostly in government positions.

Malcolm Wilkey (1970-1984) - Except for three years with the Justice Department from 1958 to 1961, he had no D.C. background.

Stephen Williams - Professor of Law and in private practice. He had no D.C. experience at all, not even with the government.

Mr. **Short**. Thank you very much for your testimony. Your full statements will go in the record as if delivered.

Mr. **Speights**. Thank you very much.

Mr. **Heubner**. Thank you.

Mr. **Friedman**. Thank you.

Mr. **Short**. Thank you very much.

Mr. Scott, James R. Scott, president, Old Dominion Bar Association, and Mr. Raymond A. Jackson, National Bar Association. Would you come forward, please? We are very happy to have you with us today, gentlemen.

Mr. Scott, if you will proceed, please. If you will limit your testimony to 5 minutes, your full statement will go in the record.

TESTIMONY OF JAMES R. SCOTT, PRESIDENT, OLD DOMINION BAR ASSOCIATION

Mr. **Scott**. Mr. Short, it is my pleasure on behalf of the Old Dominion Bar Association, as its president, to appear here before this honorable committee in support of the nomination of James Spencer for the position of judge of the U.S. District Court for the Eastern District of Virginia.

I have a prepared statement that I would like to submit for the record at this time.

Mr. **Short**. Without objection, it will be included.

Mr. **Scott**. I will therefore, having given the prepared statement, make my remarks brief.

By way of background, the Old Dominion Bar Association was founded approximately 45 years ago when six lawyers of the Commonwealth of Virginia, who happened to be black, were denied access to the State law library and its facilities. At that time, those six lawyers came together and established as an ultimate goal their resolve to make the legal process in Virginia totally fair and totally open for all citizens of the Commonwealth, consequently the nomination of James Spencer to the Federal bench is viewed by our association as being of particular historical significance.

We are honored by the fact that we were involved early on in the nomination process of Mr. Spencer. We would like to take this opportunity to thank Senator Warner for, once he was made aware of Mr. Spencer's qualifications, for considering those qualifications and for placing his name in nomination to the President for the Federal bench.

The record is clear: Mr. Spencer is imminently qualified for the position for which he has been nominated. He has served for many years as an assistant U.S. attorney and during that time has gained the requisite experience to serve as an imminent jurist and we believe that his experience as a trial attorney in particular will make his experience on the Federal bench both beneficial to the judiciary and to this country and beneficial to those who appear before him.

Finally, we would like to say that we consider this committee's action in expediting this hearing and this process to be significant. We thank the chairman of the committee and we thank its membership for participating in that process and we look forward to receiving notice of confirmation of Mr. Spencer's nomination.

Thank you.

[The prepared statement of Mr. Scott follows:]

UNITED STATES SENATE JUDICIARY COMMITTEE
STATEMENT OF JOHN W. SCOTT, JR., PRESIDENT, OLD DOMINION BAR ASSOCIATION, IN SUPPORT OF THE NOMINATION OF JAMES SPENCER FOR THE POSITION OF FEDERAL JUDGE, EASTERN DISTRICT OF VIRGINIA

(October 1, 1986)

It is an honor for me, as President of the Old Dominion Bar Association, to appear before this Committee in support of the nomination of James Spencer for the position of Judge, United States District Court for the Eastern District of Virginia. Mr. Spencer's nomination for this position in our judiciary is of great historical significance in that it marks the first time that a black person will be appointed to a Federal judgeship in our Commonwealth.

The Old Dominion Bar Association, which was founded in an effort to promote true equality for all citizens engaged in the legal system in Virginia, views this nomination as the attainment of one of our major goals. Our Association was founded 45 years ago at a painful time in our history when black persons were not permitted to use the facilities of the Virginia State Bar. In 1941, six black attorneys joined together, after they had been denied the opportunity to use the State law library, to form an organization that would promote true equality for all of those citizens of the Commonwealth engaged in the legal process. The nomination of James Spencer, an eminently qualified member of the Federal Bar, is in keeping with our Association's ultimate goal. We were, therefore, proud to be involved at the very early stages of Mr. Spencer's nomination to a Federal judgeship.

James Spencer has served this country as an Assistant United States Attorney in ~~Texas~~ The District of Columbia and Virginia. During his tenure, he has distingished himself as a respected trial lawyer. His experience at the Federal Bar will provide him with the expertise and temperament to perform his duties and responsibilities as a Federal District Court Judge.

I would like to thank Senator John Warner for recognizing Mr. Spencer's qualifications by requesting the President to consider him for appointment to the Federal judiciary. I would, also, like to thank the members of this Committee for expediting these hearings so that Mr. Spencer might receive his appointment and thereby fill the long outstanding vacancy in the Eastern District of Virginia.

Thank you for permitting me to appear before you in support of the nomination of James Spencer for the position of Judge, United States District Court for the Eastern District of Virginia.

Respectfully submitted,

John W. Scott, Jr., President
Old Dominion Bar Association

Mr. SHORT. Thank you, Mr. Scott.

Mr. Jackson.

TESTIMONY OF RAYMOND A. JACKSON, NATIONAL BAR ASSOCIATION

Mr. JACKSON. Mr. Short, it is my pleasure, as the immediate past president of the Old Dominion Bar Association, to appear here in support of the appointment of James R. Spencer as a U.S. District Judge for the Eastern District of Virginia, on behalf of the National Bar Assocation.

The National Bar Association, founded in 1925, has a very similar background to that of the Old Dominion Bar Association. The Old Dominion Bar Association is an affiliate of the National Bar Association.

Several months ago, representatives of the Old Dominion Bar Association visited Senator Warner, where we expressed our concern that qualified minority lawyers should be appointed to the Federal bench in Virginia. Senator Warner expressed his sincere commitment to nominate and support a qualified minority for the Federal bench in Virginia. Senator Warner has recommended to the President Mr. Spencer and has actively supported Mr. Spencer for appointment as a Federal judge.

The Old Dominion Bar Association and the citizens of Virginia can be rightfully proud of having Senator Warner recommend and support steadfastly this historic appointment. We are confident that Mr. Spencer will serve the Nation well as a Federal judge. As a former military lawyer and an assistant U.S. attorney in two different Federal judicial districts, he has attained the extensive litigation experience, he has learned first-hand those matters and concerns that we as citizens hold dear in our quest for justice in the Federal courts.

Most importantly, Mr. Spencer is a man of integrity and principle. The National Bar Association and the Old Dominion Bar Association, which are dedicated to the enhancement of the quality of justice for all citizens, view the appointment, the nomination and the appointment of Mr. Spencer as the realization of a goal that could only be achieved through the cooperation of men and women of good spirit and conscience working together for the common good.

In conclusion, I would like to thank Senator Thurmond, the members of this committee, the Senate Judiciary Committee, on a bipartisan effort which has made this committee hearing possible.

Thank you.

Mr. SHORT. Thank you very much, Mr. Jackson.

I think the Chairman has made it perfectly clear that he completely shares your views. He totally supports Mr. Spencer's nomination. He does have Mr. Spencer's name on the agenda for a vote of the committee in the morning at 10 o'clock, and he will do all that he can to support it and to see that it goes forward at that time.

The committee will stand adjourned.

[Whereupon, at 4:25 p.m., the committee adjourned.]

BIOGRAPHIES

DOUGLAS H. GINSBURG

NOMINEE, U.S. CIRICUT JUDGE, DISTRICT OF COLUMBIA CIRCUIT

Birth: May 25, 1946, Chicago IL.

Legal Residence: District of Columbia.

Marital Status: Married. Hallee Perkins Morgan, two children.

Education: 1968-1970—Cornell University B.S. degree. 1970-1973—University of Chicago Law School, J.D. degree.

Bar: 1973—Illinois. 1982—Massachusetts.

Experience: 1973-1974—Law Clerk to Hon. Carl McGowan, U.S. Court of Appeals, District of Columbia Circuit. 1974-1975—Law Clerk to Hon. Thurgood Marshall, U.S. Supreme Court. 1975-1983—Harvard Law School, Professor of Law (1981-1983), Asst. Professor of Law (1975-1981). 1977-1983—Private practice (part-time). 1983-1984—U.S. Department of Justice, Antitrust Division, Regulatory Affairs, Deputy Assistant Attorney General. 1984-1985—Executive Office of the President, Office of Management and Budget, Administrator for Information and Regulatory Affairs. 1985-present—U.S. Department of Justice, Antitrust Division, Assistant Attorney General.

BRUCE M. SELYA

NOMINEE, U.S. CIRICUT JUDGE, FIRST CIRCUIT

Birth: May 27, 1934, Providence, RI.

Legal Residence: Rhode Island.

Marital Status: Married. Ellen Barnes Selya, two children.

Education: 1951-1955—Harvard College, A.B. degree. 1955-1958—Harvard Law School, LL.B. degree.

Bar: 1959—District of Columbia, Rhode Island.

Experience: 1958-1960—Law Clerk to Hon. Edward Day, U.S. District Court, District of Rhode Island. 1960-1974—Gunning, LaFazia, Gnys & Selya (formerly Gunning and LaFazia. Associate 1960-1962. Partner 1962-present. 1974-1982—Selya & Iannuccillo, Partner. 10/1982-present—U.S. District Judge, District of Rhode Island.

PATRICK J. DUGGAN

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF MICHIGAN

Birth: September 28, 1933, Detroit, MI.

Legal Residence: Michigan.

Marital Status: Married. Joan Colosimo Duggan, five children.

Education: 1951-1955—Xaiver University, B.S. degree. 1955-1958—University of Detroit, School of Law, LL.B degree.

Bar: 1958—Michigan Bar.

Experience: 1/58-6/58—Brashear, Brashear & Mies, Law clerk. 6/58-12/58—State Farm Insurance, Co., claims adjuster. 1959-1976—Brashear, Brashear, Mies & Duggan. Associate (1959-61). Partner (1961-76). 1977-present—Circuit Court Judge, Wayne County Circuit Court.

ALEX T. HOWARD, JR.

NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF ALABAMA

Birth: July 9, 1924, Mobile, AL.

Legal Residence: Alabama.

Marital Status: Married. Ann Lessesne Boykin Howard, two children.

Education: 1941-1942—University of Alabama, Mobile Center. 1942-1944—Auburn University. 1946—University of Alabama, Tuscaloosa. 1946-1947—University of Alabama, Mobile Center. 1947-1950—Vanderbilt University, School of Law, LL.B degree.

Bar: 1950—Alabama.

Military Service: 1943-1946—U.S. Army, 2nd Lieutenant.

Experience: 1950-1951 U.S. Probation Officer, Southern District of Alabama. 1951—Sole practitioner. 1951-present—Johnstone, Adams, Howard, Bailey & Gordon (formerly McCorvey, Turner, Rogers, Johnstone and Adams). Associate 1951-57. Partner 1957-present. 1956-1970—U.S. Commissioner, U.S. District Court, Southern District of Alabama, (part-time).

JAMES R. SPENCER

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF VIRGINIA

Birth: March 25, 1949, Florence, SC.

Legal Residence: Virginia.

Marital Status: Married. Margaret Poles Spencer, two children.

Education: 1967-1971—Clark College, B.A. degree. 1971=1974—Harvard Law School, J.D. degree. 1981-1984 (part-time)—Howard University Divinity School.

Bar: 1974—Georgia. 1979—District of Columbia. 1985—Virginia.

Military Service: 1975-1978—U.S. Army, Judge Advocate General Corps, Captain.

Experience: 1974-1975—Atlanta Legal Aid Society, Staff attorney. 1978-1982—U.S. Attorney's Office, District of Columbia, Assistant U.S. Attorney. 1982-1983—Student—Howard University. 1983-present—U.S. Attorney's Office, Eastern District of Virginia, Assistant U.S. Attorney.

Other: November 17, 1985, Ordained Baptist minister.

JOSEPH F. ANDERSON, JR.

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF SOUTH CAROLINA

Birth: November 16, 1949, Augusta, GA.

Legal Residence: South Carolina.

Marital Status: Married. Susan Martha Herlong, three children.

Education: 1968-1972—Clemson University, B.A. degree. 1972-1975—University of South Carolina School of Law, J.D. degree.

Bar: 1976—South Carolina.

Experience: 1975-1976—Law clerk to Hon. Clement F. Haynsworth, Jr., U.S. Court of Appeals for the Fourth Circuit. 1976-present—Anderson, Anderson & Anderson (firm has various names). Partner. 1981-present—South Carolina House of Representatives, Member, House District 82.

JOHN L. NAPIER

NOMINEE, JUDGE, U.S. CLAIMS COURT

Birth: May 16, 1949, Bennettsville, SC.

Legal Residence: South Carolina.

Marital Status: Married. Pamela Ann Caughman Napier, one child.

Education: 1965-1969—Davidson College, A.B. degree. 1969-1972—University of South Carolina, Law School, J.D. degree.

Bar: 1972—South Carolina.

Experience: 1972-1978—U.S. Senate, Hon. Strom Thurmond. (1972-1973)—Legislative assistant and minority counsel, Administrative Practice and Procedure Subcommittee. (1973-1976)—Minority counsel and professional staff member, Senate Veterans Affairs Committee. (1976-1978)—Chief legislative assistant and legal counsel to Senator Thurmond and minority counsel, Antitrust and Monopoly Subcommittee. (1977)—Chief Republican counsel, Senate Special Committee on Official Conduct. 1978-1981—Goldberg, Cottingham & Easterling, Associate. 1981-1983—U.S. Congressman, Sixth District of South Carolina. 1983-1984—Goldberg, Cottingham & Easterling & Napier, Partner. 1984-present—Napier & Jennings, Partner.

JOHN PAUL WIESE

NOMINEE, JUDGE, U.S. CLAIMS COURT

Birth:; April 19, 1934, Brooklyn, NY.

Legal Residence: Virginia.

Marital Status: Married. Alice Mary Donoghue, 1 child.

Eduation: 1955-1957—Bernard Baruch School. 1959-1960—City College of New York. 1960-1962—Hobart College, B.A. Degree. 1962-1965—University of Virginia, School of Law, LL.B. degree.

Bar: 1966—District of Columbia.

Military Service: 1957-1959—U.S. Army, Private, first class.

Experience: 1965-1957—U.S Court of Claims, Law Clerk, Trial Division (1965-1966) (now U.S. Claims Court). Appellate Division (1966-1967) (now U.S. Court of Appeals, Federal Circuit). 1967-1969—Cox, Langford & Brown, Associate. 1969-1974—Hudson & Creyke, Associate (1969-1971). Partner (1971-1974). 1974-1982—U.S. Court of Claims, Trail Commissioner. 1982-prsent—U.S. Claims Court. (Reorganization of Court of Claims), Judge.

○

65-312 (292)